Due service and receipt of a copy of the within Brief for Respondent in Opposition to Petition for Writ of Certiorari is hereby admitted this .....day of November, 1939.

.....

U. S. WEBB,
Attorney General of the State of California.

.....

RALPH O. MARRON,
Deputy Attorney General.

.....

SEIBERT L. SEFTON,

Attorneys for Petitioner.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 430

CHARLES W. ANDERSON, COLLECTOR OF INTERNAL REVENUE FOR THE THIRD DISTRICT OF NEW YORK, PETITIONER

vs.

MARIAN STEEDMAN WILSON, ROBERT GOSSETT, AND HARLEM G. RUBERT, AS EXECUTORS OF THE ESTATE OF RICHARD T. WILSON, JR., DECEASED

No. 431

MARIAN STEEDMAN WILSON, ROBERT GOSSETT, AND HARLEM G. RUBERT, AS EXECUTORS OF THE ESTATE OF RICHARD T. WILSON, JR., DECEASED, PETITIONERS

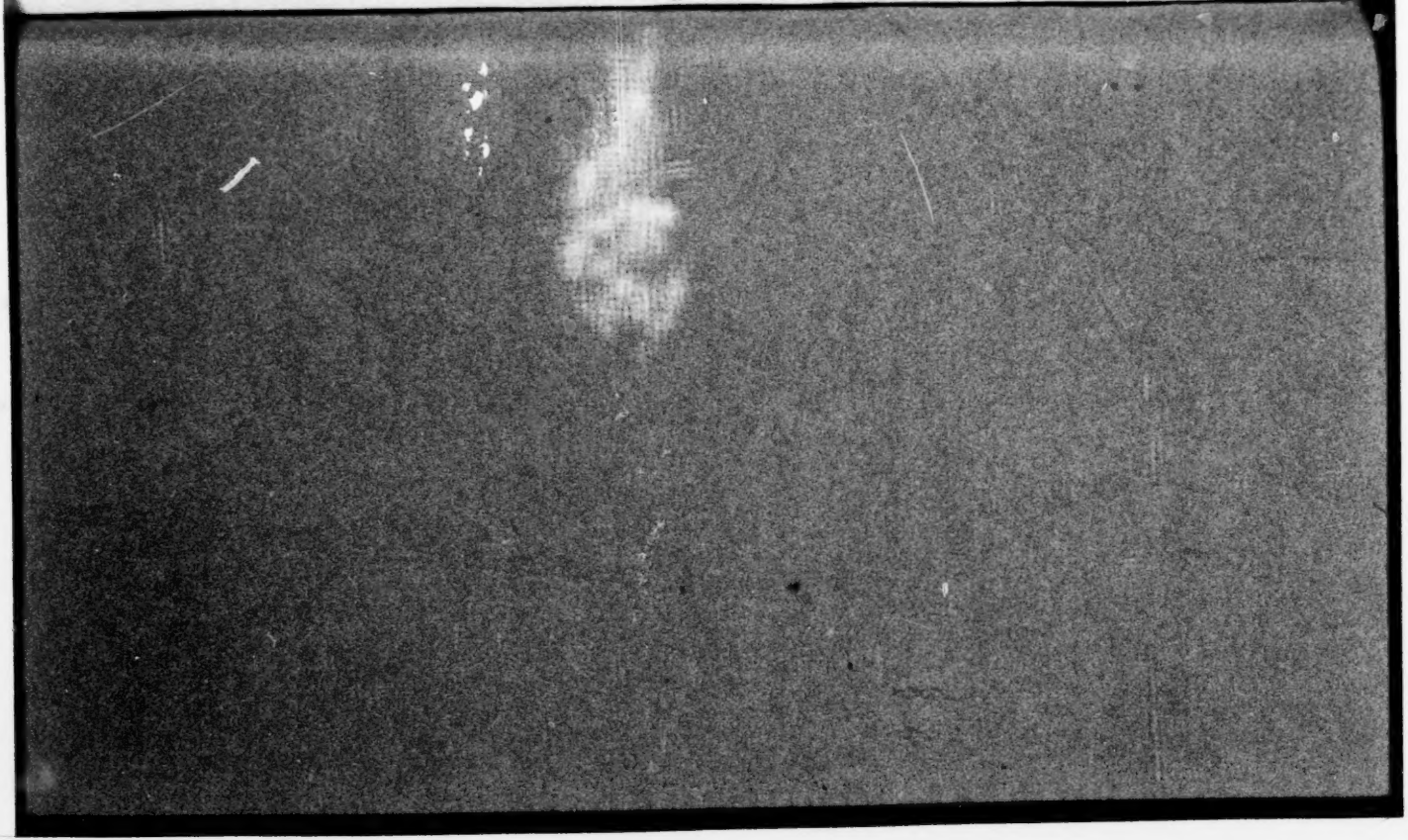
vs.

CHARLES W. ANDERSON, COLLECTOR OF INTERNAL REVENUE FOR THE THIRD DISTRICT OF NEW YORK

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONS FOR CERTIORARI FILED OCTOBER 13, 1936.
CERTIORARI GRANTED NOVEMBER 16, 1936.

(37157, 37158)



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 460

CHARLES W. ANDERSON, COLLECTOR OF INTERNAL REVENUE FOR THE THIRD DISTRICT OF NEW YORK, PETITIONER

vs.

MARIAN STEEDMAN WILSON, ROBERT GOELET, AND HARLEM G. RUBERT, AS EXECUTORS OF THE ESTATE OF RICHARD T. WILSON, JR., DECEASED

No. 461

MARIAN STEEDMAN WILSON, ROBERT GOELET, AND HARLEM G. RUBERT, AS EXECUTORS OF THE ESTATE OF RICHARD T. WILSON, JR., DECEASED, PETITIONERS

vs.

CHARLES W. ANDERSON, COLLECTOR OF INTERNAL REVENUE FOR THE THIRD DISTRICT OF NEW YORK

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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1 In United States Circuit Court of Appeals
For the Second Circuit

L 41/136

MARIAN STEEDMAN WILSON, ROBERT GOELET, AND HARLEM G. RUBERT, as executors of the estate of Richard T. Wilson, deceased, plaintiffs-appellees

v.

CHARLES W. ANDERSON, COLLECTOR OF INTERNAL REVENUE FOR THE Third District of New York, defendant-appellant

Statement under rule 13

The above action was commenced on November 15, 1927.
Complaint was filed on November 17, 1927.
Answer was filed on March 14, 1928.
The case was submitted to the court on stipulated facts on December 16th, 1929.
Judgment was entered in favor of the plaintiff in the sum of $14,438.62, on June 9, 1931.
Appeal was taken to this court on the 28th day of August, 1931.

2 In United States District Court, Southern District of New York

L. 41–136

RICHARD T. WILSON, PLAINTIFF

against

CHARLES W. ANDERSON, COLLECTOR OF INTERNAL REVENUE FOR THE Third District of the State of New York, defendant

Order of substitution of executors

January 21, 1930

On reading and filing the notice of motion of Marian Steedman Wilson, Robert Goelet, and Harlen G. Rubert, as executors of the last will and testament of Richard T. Wilson, deceased, plaintiff herein, dated January 16, 1930, and the affidavit of Harlen G. Rubert, sworn to January 15, 1930, and upon the pleadings and proceedings had in this action, now upon motion of Root, Clark, Buckner & Ballantine, attorneys for said executors, no one appearing in opposition, it is

3 Ordered that said motion be, and the same hereby is, granted and that Marian Steedman Wilson, Robert Goelet, and Harlen G. Rubert, as executors of the last will and testament of Richard T. Wilson, deceased, plaintiff herein, be substi-

tuted in the place of said Richard T. Wilson, and that said action be, and the same hereby is, continued in the name of said Marian Steedman Wilson, Robert Goelet, and Harlen G. Rubert as executors of the last will and testament of Richard T. Wilson, deceased, and that such substitution and continuance be without prejudice to any proceedings heretofore had in this action.

ALFRED C. COXE,
U. S. D. J.

In United States District Court

[Title omitted.]

Summons

To the above-named defendants:

You are hereby summoned to answer the complaint in this
4 action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiff's attorney within 20 days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable John C. Knox, judge of the District Court of the United States for the Southern District of New York, at the city of New York, this 15th day of November, A. D. 1927.

ALEX GILCHRIST, JR.,
Clerk.

ROOT, CLARK, BUCKNER, HOWLAND & BALLANTINE,
Plaintiff's Attorneys; Office and Post Office Address, 31 Nassau Street, Borough of Manhattan, city of New York.

5 In United States District Court

[Title omitted.]

Complaint

The plaintiff, above named, by Root, Clark, Buckner, Howland & Ballantine, his attorneys, complaining of the defendant herein, alleges as follows:

1. At all the times hereinafter mentioned the plaintiff was and now is a citizen of the State of New York, residing at No. 115 East 53rd Street, New York, New York, and having his principal place of business at No. 512 Fifth Avenue, New York, New York, which, after April 1, 1923, was in the third internal revenue district of the State of New York.

2. The defendant, Charles W. Anderson, on February 15, 1927, and at all times thereafter, was and now is the collector of internal

revenue for the third district of the State of New York and is a resident and inhabitant of the Southern District of New York.

6 3. This action is for the recovery of money paid by the plaintiff herein under protest, and unlawfully collected by the defendant as collector of internal revenue for the third district of the State of New York, as a Federal income tax upon the net income of the plaintiff for the calendar year 1922, and arises under sections 214 and 219 of the revenue act of 1921 (42 U. S. Statutes at Large 239, 246) and other acts of Congress.

4. On or about the 26th day of November, 1910, Richard T. Wilson, sr., died, leaving a last will and testament (a true copy of which is annexed to this complaint and marked Exhibit A and made a part hereof), dated May 3, 1905, and admitted to probate by the surrogate of New York County on December 13, 1910. By the terms of said last will and testament the executors were directed to set up certain trusts out of the decedent's estate and the residuary estate of the decedent, consisting largely of real estate and shares of manufacturing and business corporations, was left in equal shares to his five children, one of whom, Richard T. Wilson, is the plaintiff herein. In 1922 all of said five children were of full age and competent to manage their affairs.

5. At the time of his death said Richard T. Wilson, sr., was the owner of the real estate known as the Commercial Building, 384–6 Broadway, New York, New York. Prior to 1922 the executors of the estate of Richard T. Wilson, sr., had practically completed the administration of the estate, had set up out of the decedent's

7 personal estate all of the trusts provided for in paragraphs second, third, and fourth of the will, and prior to 1922 all of the assets of the decedent had been disposed of or distributed except the Commercial Building, 384–6 Broadway, New York, New York, and certain undeveloped real estate in Washington, D. C., known as Wilson Park. The said Commercial Building was not devised by the decedent to the executors as trustees and no trust was created with respect thereto, but said executors were given power to sell said Commercial Building and to hold and manage it until in their judgment it could be advantageously sold.

In 1922 and for a number of years prior thereto the executors distributed the entire net income of the estate received by them to the five residuary legatees and such income was reported by said residuary legatees as individuals for income tax purposes. In 1922 said executors, acting under the power of sale given them in the will, sold the Commercial Building, 384–6 Broadway, New York, New York, for $165,000. The fair market value of such property on March 1, 1913, and the fair market value of such property at the time of the death of Richard T. Wilson, sr., was $290,000. Such sale resulted in a loss of $125,000. The plaintiff, as one of the heirs and residuary legatees of Richard T. Wilson, sr., and the owner of an undivided one-fifth interest in said Commercial Building, was

entitled to deduct from his income for 1922 one-fifth of such loss, or $25,000. In the alternative, if the executors as fiduciaries are held to be the owners in trust of said Commercial Building and
8 entitled to deduct from the trust income the loss resulting from the sale of said property, the fiduciaries sustained a net loss for the year 1922 of $125,005.84, and the plaintiff, as the benecial owner of one-fifth of the assets held by the fiduciaries and the person entitled to the current distribution of one-fifth of the income and one-fifth of the proceeds of any sale of property received by the executors, was entitled to deduct from his income for 1922 one-fifth of said net loss, or $25,001.17. The additional income tax of $13,385.62 for 1922 wrongfully collected from the plaintiff, as hereinafter alleged, is due solely to the refusal to allow said deduction of $25,001.17.

6. By notice and demand, Charles W. Anderson, the defandant herein, as collector of internal revenue for the third district of the State of New York, notified the plaintiff of an additional assessment of income tax on the net income of the plaintiff for the calendar year 1922 in the amount of $13,385.62 and interest thereon amounting to $2,808.32, and demanded payment thereof on or before February 15, 1927.

7. On February 15, 1927, the plaintiff, under protest, paid the amount of said additional assessment of $13,385.62 and interest thereon of $2,808.32, to the defendant herein as collector of internal revenue for the third district of the State of New York. At the time said additional assessment with interest was paid, the whole amount of income tax legally due upon the net income of the plaintiff for the calendar year 1922 had already been paid and the
9 amount of said additional assessment and interest thereon was erroneously and illegally collected by the defendant herein.

8. Thereafter, on April 6, 1927, pursuant to section 3220 of the Revised Statutes as amended by the revenue acts of 1921, and pursuant to other acts of Congress and to rules of the Treasury Department in such cases made and provided, the plaintiff duly filed with said collector of internal revenue, on Form 843, a claim for refund of said additional tax and interest of $16,193.94, paid by the plaintiff under protest and illegally collected as aforesaid by the defendant herein. A copy of said claim for refund is hereto annexed and marked Exhibit B. Subsequently, on or about June 23, 1927, by letter dated June 23, 1927, and within two years prior to the commencement of this action, the Commissioner of Internal Revenue notified the plaintiff of the total disallowance of said claim for refund.

9. By reason of the illegality of the collection of said sum of $16,193.94, paid by the plaintiff under protest to the defendant as aforesaid, said defendant became indebted to the plaintiff in said sum for money had and received by said defendant to the use and for the benefit of the plaintiff. Said sum of $16,193.94 so received by the defendant, is still retained by him without legal right, and said

defendant has refused and still refuses to pay the same or any part thereof to the plaintiff, although payment thereof has been duly demanded, and said defendant is now indebted to the plaintiff in said sum of $16,193.94, with interest thereon from Feb-
10 ruary 15, 1927, for money had and received by said defendant to the use and for the benefit of the plaintiff.

Wherefore, plaintiff demands judgment against the defendant for the sum of $16,193.94 with interest thereon from February 15, 1927, together with the costs and disbursements of this action.

ROOT, CLARK, BUCKNER, HOWLAND & BALLANTINE,
Attorneys for plaintiff, Office and post-office address, 31 Nassau Street, Borough of Manhattan, New York City.

[*Duly sworn to by Richard T. Wilson, jurat omitted in printing.*]

11 *Exhibit A to complaint*

LAST WILL AND TESTAMENT OF R. T. WILSON

Dated May 3, 1905. Probated December 3, 1910

I, Richard T. Wilson, do make, publish, and declare this to be my last will and testament:

First: I direct my just debts and funeral expenses to be promptly paid.

Second: I direct my executors hereinafter named to set apart out of my estate a fund of two hundred and fifty thousand dollars, which I given and bequeath to my wife, Melissa Clementine, for and during her lifetime; and upon her death I give and bequeath the same to my lineal descendants then living per stirpes and not per capita. I make no further provision for my wife for the reason that she is already otherwise amply provided for.

Third: I direct my executors to set apart out of my estate five separate sums or funds of five hundred thousand dollars each, which I give and bequeath to Union Trust Company of New York, in trust nevertheless, to invest and reinvest the same, to collect and receive the income thereof, and to pay over the net income of one of such funds to my son Marshall Orme Wilson during his
12 lifetime; the net income of another of such funds to my son Richard T. Wilson, jr., during his lifetime; the net income of another of such funds to my daughter Mary R. Goelet during her lifetime; the net income of another of such funds to my daughter Lelia Belle Herbert during her lifetime; and the net income of another of such funds to my daughter Grace G. Vanderbilt during her lifetime; and upon the death of each of my said sons and daughters I give and bequeath the principal of the fund then so held in trust for him or her to his or her lineal descendants then living per stirpes and not per capita, and in default of any such lineal descendant, to his or her brothers and sisters then living and the

lineal descendants then living of any thereof who may theretofore have died, per stirpes and not per capita.

Fourth: All the rest, residue, and remainder of my property, real, personal, and of every kind and description, which I shall own at the time of my death, I direct my executors hereinafter named to sell and convert into personalty, and to divide the proceeds thereof into five equal parts which I give and bequeath as follows:

(1) To my son Marshall Orme Wilson one of such parts to be his absolutely.

(2) To my daughter Mary R. Goelet one of such parts to be hers absolutely.

(3) One of such parts to the amount of five hundred thousand dollars I direct to be added to the trust fund of five hundred
13 thousand dollars created in and by the foregoing third article of this will for the benefit of my son Richard T. Wilson, jr., and to be subject to the provisions of said third article, both as to the income therefrom and the disposition of the principal thereof, as if a part of said original trust fund; and the balance of such part I give and bequeath to my said son Richard T. Wilson, jr., to be his absolutely.

(4) One of such parts to the amount of five hundred thousand dollars, I direct to be added to the trust fund of five hundred thousand dollars created in and by the foregoing third article of this will for the benefit of my daughter Lelia Belle Herbert, and to be subject to the provisions of said third article, both as to the income therefrom and the disposition of the principal thereof as if a part of said original trust fund; and the balance of such part I give and bequeath to my said daughter Lelia Belle Herbert to be hers absolutely.

(5) One of such parts to the amount of five hundred thousand dollars I direct to be added to the trust fund of five hundred thousand dollars created in and by the foregoing third article of this will for the benefit of my daughter Grace G. Vanderbilt, and to be subject to the provisions of said third article, both as to the income therefrom and the disposition of the principal thereof, as if a part of said original trust fund; and the balance of such part I give and bequeath to my said daughter Grace G. Vanderbilt to be hers absolutely.

14 Fifth: I direct my executors hereinafter named in the administration of my estate to first constitute the funds mentioned in the foregoing second and third articles out of securities at their market value belonging to my estate, or the proceeds thereof, other than shares of any manufacturing or business corporation, or out of securities purchased by my executors for that purpose, at their cost; and such funds as so constituted shall be deemed to be the funds bequeathed in and by said second and third articles.

I direct my executors to next set apart out of my residuary personal estate, excepting the shares of any manufacturing or business

corporation, either in securities belonging thereto, at their market value, or the proceeds thereof or out of securities purchased by my executors for that purpose, at their cost, a sum sufficient to make the addition of five hundred thousand dollars to each of the trust funds for the benefit of my son Richard T. Wilson, jr., and my daughters Lelia Belle Herbert and Grace G. Vanderbilt provided for in subdivisions 3, 4 and 5 of the foregoing fourth article, and to pay to my son Marshall Orme Wilson and my daughter Mary R. Goelet each the sum of five hundred thousand dollars as part of their respective shares in my said residuary estate. Securities so set apart for this purpose shall be accepted by the trustees of the trusts and said individual legatees as a distribution of such portion of my residuary estate.

The judgment of my said executors as to what securities shall be set apart for the constitution of the various sums or funds hereinbefore in this article mentioned, and as to the market value thereof for such purpose, and as to what securities shall be purchased therefor, if any, shall be final and binding on all parties interested in my estate.

As the balance of my residuary estate will largely consist of real estate in this and other States and shares of manufacturing and business corporations which should not be sold excepting under favorable conditions, I direct my said executors to hold and manage such remaining portion of my residuary estate until in their judgment it can from time to time be advantageously sold and disposed of, not exceeding, however, a period longer than the lives of my sons Marshall Orme Wilson and Richard T. Wilson, jr., and the survivor of them, and I hereby authorize and empower my said executors within said period to sell, convey, assign, and transfer the same, or any part thereof, at such time or times as they may deem for the best interests of my estate, and upon such terms and conditions as they may deem proper, including the terms and mode of payment therefor.

I authorize and empower my said executors in their discretion, should they deem it a more advantageous method for the management and disposition of such portion of residuary estate, to cause to be organized a corporation under the laws of this or any other State, and to convey and transfer the same or any part thereof to such corporation, and receive in payment therefor the capital stock of said corporation; and to hold the said capital stock until it can in their judgment be advantageously disposed of, not exceeding, however, a period longer than the lives of my sons Marshall Orme Wilson and Richard T. Wilson, jr., and the survivor of them; and to sell and dispose of the same, or any part thereof, at any time or from time to time during such period when they shall deem it most advantageous to the persons interested in my estate, and upon such terms, including the terms and mode of payment therefor, as they may deem proper.

Upon any sale or disposition being made by my said executors of such portion of my residuary estate, or of any part thereof, or of the shares of the corporation which they are hereinbefore authorized to incorporate, or any part thereof, I authorize and empower my said executors if the proceeds, or any part thereof, may in their judgment be distributed among the persons entitled thereto hereunder without any detriment to their interests to so distribute them forthwith; or in their discretion to retain the same, or any part thereof, for further conversion before distribution, not, however, beyond the period of the lives of my said sons and the survivor of them.

During the period that my said executors shall hold such portion of my residuary estate or the shares of the corporation which they are hereinbefore authorized to incorporate, or any part thereof, they shall semiannually pay over the net income thereof, or of such parts thereof as may be unsold or undistributed, to the persons to whom my residuary estate is bequeathed in and by the foregoing fourth article in the proportion of their respective interests.

I further direct that the income from the fund set apart for the benefit of my wife pursuant to the foregoing second article
17 shall be paid to her by my said executors semiannually, and that during her lifetime they shall keep the same invested in such stocks, bonds, mortgages, or other securities as they may deem proper without regard to any limitations on investments by trustees.

I further authorize my said executors to vote in person or by proxy on the shares of stock of any corporation held by them as such executors at any meeting of the stockholders of such corporation or corporations; and with respect to the shares of stock, bonds, scrip, or other securities of any corporation which they at any time hold as such executors, including any corporation which they may cause to be incorporated as hereinbefore authorized, to consent to the merger, lease, consolidation or re-organization of such corporation or corporations, and to make any surrender, exchange or substitution of stock, bonds, scrip or other securities as an incident thereto; and to surrender or exchange the same for any shares of stock, bonds, scrip or other securities issued in lieu thereof, or to retire the same, under any plan or scheme other than a merger, lease, consolidation or re-organization; and generally to have and exercise as to all such matters the powers of an individual owner who is under no trust obligation.

Sixth: I authorize and empower Union Trust Company of New York as trustee of the trusts hereinbefore created, and its successor or successors in the trusts, to retain as proper investments any and all securities of which such trust estate may consist as constituted by my said executors: to invest and reinvest the funds of the
18 trust estates in real estate and in such stocks, bonds, and other securities as it or they may deem proper without reference to any limitations as to the kinds or classes of securities in which a trustee may invest trust funds; and I hereby confer upon it and

them, with respect to any shares of stock, bonds, scrip or other securities of any corporation which may at any time form a part of any of said trust estates, the same powers in the case of the merger, lease, consolidation, or re-organization of such corporation or corporations, or of any plan or scheme other than a merger, lease, consolidation or re-organization, as are hereinbefore conferred upon my executors under like circumstances.

I further direct that in case of securities passing to, taken or purchased at a premium by the said trustee, its successor or successors, it and they shall not be bound to set apart any portion of the income as a sinking fund to restore or absorb such premium.

I further direct that my interest in the firm of R. T. Wilson & Co., composed of myself and my sons Marshall Orme Wilson and Richard T. Wilson, Jr., at the time of my death shall be ascertained and determined as soon after my death as is consistent with a due regard to the best interests of my estate and said firm; and that the statements or accounts rendered by my sons as the surviving partners of said firm, showing fixing and determining such interest, and their payment or liquidation of the same out of the assets of the firm in cash or securities or both, when approved by their co-executor James M. Edwards, shall be binding and conclusive on all parties in-
19 terested in my estate notwithstanding the interest of my said sons in said firm and my estate and that they are executors of this will.

Seventh: I direct that any and all transfer, succession, or legacy taxes that may be levied on my estate, or become payable in respect of any interest passing under this will, including all such taxes upon interests for life or in remainder, be paid by my executors out of the principal of my residuary estate.

Eighth: The provision herein made for my wife is to be taken and received by her in lieu and bar of her dower and dower rights in any and all real estate wherever situated which I may own at the time of my death.

Ninth: I appoint my sons Marshall Orme Wilson and Richard T. Wilson, jr., and my friend James M. Edwards, of Morristown, New Jersey, executors of this my last will and testament. Upon the death of any of my said executors or of any of their successors appointed as herein provided, I appoint in his place and stead as an executor of this my will such person as may be designated by my surviving executors by a writing under their hands filed in the office of the surrogate's court where this will shall be probated, it being my intention that there shall always be three executors engaged in the administration of my estate. I direct that my said executors shall not be required to file an inventory of my estate, and that no bond or other security shall be required of them or either of them, or of said Union Trust Company of New York as trustee of the trusts under this will.

20 Tenth: I hereby revoke all former wills by me made.

In witness whereof I have hereunto set my hand and seal this 3rd day of May, in the year one thousand nine hundred and five.

RICHARD T. WILSON. [L. S.]

Signed, sealed, published, and declared by Richard T. Wilson, the testator above named, as and for his last will and testament in our presence, and we, at his request, and in his presence, and in the presence of each other have hereto subscribed our names as witnesses.

LEWIS CASS LEDYARD, Jr.,
2 East 87th Street, N. Y. City.

J. F. VAN NAME,
362 Evergreen Ave., Brooklyn, N. Y.

NORMAN L. ZENO,
148 Hancock St., Brooklyn, N. Y.

21 *Exhibit "B" to complaint*

(Execute separate form for each tax period)

Claim for abatement of tax assessed—Credit against outstanding Assessments—X Refund of taxes illegally collected—Refund of amounts paid for stamps used in error or excess.

TREASURY DEPARTMENT
Internal Revenue Service
Form 843—Jan. 1922
Comptroller General U. S.
January 18, 1922

IMPORTANT

File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

Collector's Notation
District
Account number
Date received
stamp here
Collector of Internal Revenue

Date received by
Administrative Unit.
stamp here

NOTICE TO COLLECTOR

Collector must indicate in block above the kind of claim, except in Income Tax cases.

STATE OF NEW YORK,
County of New York, ss:

RICHARD T. WILSON,
512 Fifth Avenue,
New York City.

This deponent, being duly sworn according to law, deposes
22 and says that this statement is made on behalf of the taxpayer

named, and that the facts given below with reference to said statement are true and complete:

	Period Year
	From: Jan. 1, 1922
	To: ——— 19—
1. Business in which engaged	
2. Character of assessment or tax: Personal income tax, Dec. 31, 1922.	
3. Amount of assessment	$13,385.62
4. Reduction of tax liability requested (income and profits tax)	$13,385.62
5. Amount to be abated	$———
6. Amount to be refunded (or such greater amount as is legally refundable)	$16,193.94
7. Dates of payment (see collector's receipts or indorsements of canceled checks): February 15, 1927, with interest.	
(If statement covers income tax liability, items 8–11, inclusive, must be answered.)	
8. District in which return (if any) was filed: New York second district.	
9. District in which unpaid assessment appears	
10. Amount of overpayment claimed as credit	$———
11. Unpaid assessment against which credit is asked; period from ——— to ———	$———

Deponent verily believes that this application should be allowed for the following reasons:

Memorandum attached.*

Signed: RICHARD T. WILSON.

Sworn to and subscribed before me
this 4 day of April, 1927.

NORMAN L. ZENO,
Notary Public, New York County, N. Y.

New York county clerk's No. 38.
New York register's No. 8043.
Term expires March 30, 1928.

24 In United States District Court

[Title omitted.]

Answer

The defendant for his answer to the complaint herein by Charles H. Tuttle, his attorney:

I. Answering paragraphs 1 and 4 denies any knowledge or information sufficient to form a belief as to the truth of the allegations contained in the said paragraphs.

II. Answering paragraph 3 denies that the sum of $16,193.94 paid by the plaintiff to the defendant on account of the additional assessment of an income tax against the plaintiff was unlawfully collected by the defendant.

III. Answering paragraph 5 denies any knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraph except that he admits that the additional income tax of $13,385.62 collected by the defendant from the
25 plaintiff on or about February 15, 1927 on account of income taxes assessed against the plaintiff for the year 1922 repre-

* Printed at end of Stipulation of facts.

sents the amount due from the plaintiff as a result of the refusal of the United States Commissioner of Internal Revenue to allow a deduction in the amount of $25,001.17 claimed by the plaintiff in respect of his income for the year 1922.

IV. Answering paragraph 7 admits that the plaintiff paid to the defendant in respect of income taxes for the year 1922 on or about February 15, 1927, the amount of $13,385.62 and interest thereon in the amount of $2,808.32, but on information and belief denies each and every remaining allegation contained in said paragraph.

V. Answering paragraph 8 admits that on or about April 6, 1927, the plaintiff filed with the United States Commissioner of Internal Revenue a claim for the refund of the amount of $16,193.94 in respect of an additional assessment of income taxes paid by the plaintiff on or about February 15, 1927 and that the United States Commissioner of Internal Revenue rejected said claim in its entirety on or about June 23, 1927 but the defendant denies that said amount of $16,193.94 was illegally collected from the plaintiff.

VI. Answering paragraph 9 denies each and every allegation contained therein except that the amount of $16,193.94 was received by the defendant in respect of an additional assessment of income taxes against the plaintiff for the year 1922 and that the defendant has refused to pay said amount to the plaintiff although the same has been demanded.

26 Wherefore, the defendant demands judgment dismissing the complaint herein together with the costs and disbursements of this action.

CHARLES H. TUTTLE,

United States Attorney for the Southern District of New York, attorney for defendant, office & P. O. address, U. S. Courts & P. O. Bldg., Borough of Manhattan, city of New York.

[*Duly sworn to by Charles W. Anderson; jurat omitted in printing.*]

27 IN UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK

[Title omitted.]

Defendant's bill of exceptions

STIPULATION OF FACTS

It is hereby stipulated between the parties to the above-entitled action that the following facts are true:

1. At all the times hereinafter mentioned the plaintiff was, and now is, a citizen of the State of New York, residing at No. 300 Park Avenue, New York, New York, and having his principal place of business at No. 512 Fifth Avenue, New York, New York, which,

after April 1, 1923, was in the third internal revenue district of the State of New York.

2. The defendant, Charles W. Anderson, on February 15, 1927, and at all times thereafter, was, and now is, the collector of internal revenue for the third district of the State of New York,
28 and is a resident and inhabitant of the Southern District of New York.

3. On November 26, 1910, Richard T. Wilson, sr., died, leaving a last will and testament (a true copy of which is annexed to this stipulation, marked "Exhibit A," and made a part thereof), dated May 3, 1905, and admitted to probate by the surrogate of New York County on December 13, 1910. Letters testamentary were duly granted to Marshall Orme Wilson, Richard T. Wilson, jr. (the plaintiff herein), and James M. Edwards, the executors named in the will, on December 13, 1910, and at all times thereafter until November, 1921, the said Marshall Orme Wilson, Richard T. Wilson, jr., and James M. Edwards were the duly qualified and acting executors under the will. In November, 1921, James M. Edwards died, and pursuant to the terms of the will, letters testamentary were granted to R. Thornton Wilson, a son of Marshall Orme Wilson, in the place and stead of James M. Edwards, and thereafter at all times herein mentioned the said Marshall Orme Wilson, Richard T. Wilson, jr. and R. Thornton Wilson were the duly qualified and acting executors under the will.

4. The five children of Richard T. Wilson, sr., namely, Marshall Orme Wilson, Mary R. Goelet, Grace T. Vanderbilt, Lelia Belle Herbert, and Richard T. Wilson, jr. (the plaintiff herein), named as distributees in said will, were all of full age and competent to manage their affairs at all times herein mentioned.

5. Melissa Clementine Wilson, wife of Richard T. Wilson,
29 sr., mentioned in paragraphs "second," "sixth" and "eighth" of the will, died on May 30, 1908, prior to the death of Richard T. Wilson, sr., and thereafter Richard T. Wilson, sr., was not married.

6. At the time of his death, said Richard T. Wilson, sr., was the owner of property in the State of New York having the following values:

Real estate	$2,216,083.33
Personal chattels	670,814.96
Corporate bonds and stocks	5,054,612.39
Interest in R. T. Wilson & Company, a partnership	8,838,658.10
Total	16,780,168.78

Included in the said real estate were the premises located at 384-6 Broadway, New York, New York, referred to herein as the "Commercial Building," a six-story office building, acquired by Richard T. Wilson, sr., at a cost of $210,000.00.

Richard T. Wilson, sr., was also the owner of certain real estate outside of the State of New York having a total value of approximately $100,000.

The total debts of the estate, including commissions to be paid the executors and attorneys fees to be paid, were as follows:

Funeral expenses	$2,910.17
Administration expenses	150,000.00
Debts of decedent	9,862.75
Commissions of executors	544,355.07
Total	707,127.99

30 7. In the years 1911 and 1912, the executors under the will of Richard T. Wilson, sr., created out of the personal property of the estate all of the trusts and additions thereto provided for in paragraphs "Third," "Fourth," and "Fifth" of the will.

8. Prior to 1922, the executors under the will of Richard T. Wilson, sr., had sold or disposed of real estate other than the said Commercial Building, in the following years and for the following contract prices:

1910 (real estate outside of New York)	$168.08
1911 (real estate outside of New York)	466.00
1912 (real estate outside of New York)	1,454.00
1913 (real estate outside of New York)	40,154.78
1914 (real estate outside of New York)	997.86
1914 (real estate in New York)	400,000.00
1915 (real estate outside of New York)	21,864.70
1915 (real estate in New York)	1,487,500.00
1916 (real estate in New York)	125,000.00
1919 (real estate outside of New York)	2,700.00
1919 (real estate in New York)	139,000.00
1920 (real estate outside of New York)	53,894.01
Total	2,373,099.43

31 9. Prior to and during the year 1922, the executors made the following total distributions to the five residuary legatees, including the plaintiff herein, in equal shares:

1912 cash and securities	$5,000,000.00
1913 cash	250,000.00
1914 cash and securities	1,150,000.00
1915 cash	700,000.00
1916 cash	5,450,000.00
1917 cash and securities	1,217,736.35
1919 cash and securities	68,238.65
1920 cash	50,000.00
1922 cash	50,000.00
Total	13,935,975.00

The said distributions included the entire net income of the estate for each year in which the distributions were made. The income so distributed was reported by the said residuary legatees, including the plaintiff herein, as individuals, for Federal tax purposes, for the year 1919 and each year thereafter. For the years 1916 and 1917 the Federal income tax was withheld by the estate and paid by it. No distribution was made in the year 1918 and the Federal income tax on the income of the estate was reported by the estate and the tax paid by the estate for that year.

Prior to 1922, pursuant to the terms of the will, all of the assets of the decedent not used in setting up said trust had been distributed

or disposed of and the proceeds distributed, except the said Commercial Building, certain undeveloped real estate in Wash-
32 ington, D. C., known as "Wilson Park," having a value of approximately $40,000, certain other real estate having a value of approximately $1,000, and certain personal property having a value of approximately $150,000. Prior to 1922, all of the debts of the decedent and of the estate, except current expenses, had been paid.

The executors did not form or cause to be formed the corporation mentioned in the fifth paragraph of the will.

The executors of the estate filed three intermediate accounts and orders of the surrogates' court of the county of New York settling such accounts were entered on or about April 20, 1917, April 8, 1919, and November 14, 1921, respectively. No other or further accounts have been filed by the executors.

10. In 1922, said executors, acting under the will, sold the said Commercial Building for $165,000. The fair market value of such property on March 1, 1913, and the fair market value of such property at the time of the death of said Richard T. Wilson, sr., was $290,000.00 The total allowable depreciation sustained on the said property between March 1, 1913, and the date of sale was $11,700.00. Such sale resulted in a loss of $113,300.00.

In 1922, the income and expenditures of the estate were reported as follows:

33

INCOME	
Interest from bank deposits, mortgages, etc	$10 825.78
Rent from Commercial Building	3,450.00
Loss on sale of Commercial Building	125,000.00
Loss on sale of stocks	4,673.75
Profit on sale of Florida lands	19.81
Dividends stock of foreign corporations	473.77
Refund of unexpired insurance premiums on Commercial Building	111.84
Total income (loss)	$114,792.55

DEDUCTIONS	
Taxes paid	$2,661.42
Commissions on sale of Commercial Building	1,646.17
Notary fees on sale of Commercial Building	30.70
Salaries and rent of office in connection with administering the estate	5,875.00
Total deductions	$10,213.29
Net income (loss)	$125,005.84

11. On or about March 14, 1923, the plaintiff, Richard T. Wilson, filed his individual Federal income tax return for the calendar year 1922, which return showed a net income of $85,312.19 and a tax of $23,423.06, all of which was duly paid. In reporting said
34 net income, one-fifth of the above loss, or $25,001.17, was deducted by the plaintiff from his gross income. It is agreed that if the plaintiff is entitled to the deduction claimed that the correct amount thereof is $22,660.00.

On or about January 29, 1927, the Commissioner of Internal Revenue made an additional assessment against the plaintiff in the amount of $13,385.62, for the calendar year 1922, all of which additional assessment was based solely on the disallowance of the deduction of said $25,001.17.

12. Thereafter, by notice and demand, Charles W. Anderson, the defendant herein, as collector of internal revenue for the third district of the State of New York, notified the plaintiff of said additional assessment of income tax for the calendar year 1922 in the amount of $13,385.62 and interest thereon amounting to $2,808.32, and demanded payment thereof on or before February 15, 1927.

On February 15, 1927, the plaintiff, under protest, paid the amount of said additional assessment of $13,385.62 and interest thereon of $2,808.32, making a total payment of $16,193.94, to the defendant herein as collector of internal revenue for the third district of the State of New York.

13. Thereafter, on April 6, 1927, the plaintiff duly filed with the said collector of internal revenue, on Form 8483, a claim for refund of said additional tax and interest, of $16,193.94. A copy of said
35 claim for refund is hereto attached, marked Exhibit B, and made a part thereof. On June 23, 1927, and within two years prior to the commencement of this action, the Commissioner of Internal Revenue notified the plaintiff of the total disallowance of said claim for refund.

ROOT, CLARK, BUCKNER, HOWLAND & BALLANTINE,
Attorneys for Plaintiff.

CHARLES H. TUTTLE,
Attorney for Defendant.
By EDWARD FELDMAN.

Exhibit "A" to stipulation

LAST WILL AND TESTAMENT OF R. T. WILSON

Dated May 3, 1905. Probated December 3, 1910

I, Richard T. Wilson, do make, publish, and declare this to be my last will and testament:

First: I direct my just debts and funeral expenses to be promptly paid.

Second: I direct my executors hereinafter named to set apart out of my estate a fund of two hundred and fifty thousand dollars,
36 which I give and bequeath to my wife Melissa Clementine for and during her lifetime; and upon her death I give and bequeath the same to my lineal descendants then living per stirpes and not per capita. I make no further provision for my wife for the reason that she is already otherwise amply provided for.

Third: I direct my executors to set apart out of my estate five separate sums or funds or five hundred thousand dollars each, which I give and bequeath to Union Trust Company of New York, in trust

nevertheless, to invest and reinvest the same, to collect and receive the income thereof, and to pay over the net income of one of such funds to my son Marshall Orme Wilson during his lifetime; the net income of another of such funds to my son Richard T. Wilson, jr., during his lifetime; the net income of another of such funds to my daughter Mary R. Goelet during her lifetime; the net income of another of such funds to my daughter Lelia Belle Herbert during her lifetime; and the net income of another of such funds to my daughter Grace G. Vanderbilt during her lifetime; and upon the death of each of my said sons and daughters I give and bequeath the principal of the fund then so held in trust for him or her to his or her lineal descendants then living per stirpes and not per capita, and in default of any such lineal descendant, to his or her brothers and sisters then living and the lineal descendants then living of any thereof who may theretofore have died, per stirpes and not per capita.

Fourth: All the rest, residue, and remainder of my prop-
37 erty, real, personal, and of every kind and description, which I shall own at the time of my death, I direct my executors hereinafter named to sell and convert into personalty, and to divide the proceeds thereof into five equal parts which I give and bequeath as follows:

(1) To my son Marshall Orme Wilson one of such parts to be his absolutely.

(2) To my daughter Mary R. Goelet one of such parts to be hers absolutely.

(3) One of such parts to the amount of five hundred thousand dollars I direct to be added to the trust fund of five hundred thousand dollars created in and by the foregoing third article of this will for the benefit of my son Richard T. Wilson, jr., and to be subject to the provisions of said third article, both as to the income therefrom and the disposition of the principal thereof, as if a part of said original trust fund; and the balance of such part I give and bequeath to my said son Richard T. Wilson, jr., to be his absolutely.

(4) One of such parts to the amount of five hundred thousand dollars, I direct to be added to the trust fund of five hundred thousand dollars created in and by the foregoing third article of this will for the benefit of my daughter Lelia Belle Herbert, and to be subject to the provisions of said third article, both as to the income therefrom and the disposition of the principal thereof as if a part of said original trust fund; and the balance of such
38 part I give and bequeath to my said daughter Lelia Belle Herbert to be hers absolutely.

(5) One of such parts to the amount of five hundred thousand dollars I direct to be added to the trust fund of five hundred thousand dollars created in and by the foregoing third article of this will for the benefit of my daughter Grace G. Vanderbilt, and to be subject to the provisions of said third article, both as to the income therefrom and the disposition of the principal thereof, as if

a part of said original trust fund; and the balance of such part I give and bequeath to my said daughter Grace G. Vanderbilt to be hers absolutely.

Fifth: I direct my executors hereinafter named in the administration of my estate to first constitute the funds mentioned in the foregoing second and third articles out of securities at their market value belonging to my estate, or the proceeds thereof, other than shares of any manufacturing or business corporation, or out of securities purchased by my executors for that purpose, at their cost; and such funds as so constituted shall be deemed to be the funds bequeathed in and by said second and third articles.

I direct my executors to next set apart out of my residuary personal estate, excepting the shares of any manufacturing or business corporation, either in securities belonging thereto, at their market value, or the proceeds thereof or out of securities purchased by my executors for that purpose, at their cost, a sum sufficient to
39 make the addition of five hundred thousand dollars to each of the trust funds for the benefit of my son Richard T. Wilson, jr., and my daughters Lelia Belle Herbert and Grace G. Vanderbilt provided for in subdivisions 3, 4 and 5 of the foregoing fourth article, and to pay to my son Marshall Orme Wilson and my daughter Mary R. Goelet each the sum of five hundred thousand dollars as part of their respective shares in my said residuary estate. Securities so set apart for this purpose shall be accepted by the trustees of the trusts and said individual legatees as a distribution of such portion of my residuary estate.

The judgment of my said executors as to what securities shall be set apart for the constitution of the various sums or funds hereinbefore in this article mentioned, and as to the market value thereof for such purpose, and as to what securities shall be purchased therefor, if any, shall be final and binding on all parties interested in my estate.

As the balance of my residuary estate will largely consist of real estate in this and other States and shares of manufacturing and business corporations which should not be sold excepting under favorable conditions, I direct my said executors to hold and manage such remaining portion of my residuary estate until in their judgment it can from time to time be advantageously sold and disposed of, not exceeding however a period longer than the lives of my sons Marshall Orme Wilson and Richard T. Wilson, jr., and the survivor of them, and I hereby authorize and empower my said executors within said period, to sell, convey, assign and transfer the same or any part thereof, at such time or times as they may
40 deem for the best interests of my estate, and upon such terms and conditions as they may deem proper, including the terms and mode of payment therefor.

I authorize and empower my said executors in their discretion, should they deem it a more advantageous method for the management and disposition of such portion of residuary estate, to cause to be

organized a corporation under the laws of this or any other state, and to convey and transfer the same or any part thereof to such corporation, and receive in payment therefor the capital stock of said corporation; and to hold the said capital stock until it can in their judgment be advantageously disposed of, not exceeding, however a period longer than the lives of my sons Marshall Orme Wilson and Richard T. Wilson, jr., and the survivor of them; and to sell and dispose of the same, or any part thereof, at any time or from time to time during such period when they shall deem it most advantageous to the persons interested in my estate, and upon such terms, including the terms and mode of payment therefor, as they may deem proper.

Upon any sale or disposition being made by my said executors of such portion of my residuary estate, or of any part thereof, or of the shares of the corporation which they are hereinbefore authorized to incorporate, or any part thereof, I authorize and empower my said executors if the proceeds, or any part thereof, may in their judgment be distributed among the persons entitled thereto here-
under without any detriment to their interests to so distribute
41 them forthwith; or in their discretion to retain the same, or any part thereof, for further conversion before distribution, not, however, beyond the period of the lives of my said sons and the survivor of them.

During the period that my said executors shall hold such portion of my residuary estate or the shares of the corporation which they are hereinbefore authorized to incorporate, or any part thereof, they shall semiannually pay over the net income thereof, or of such parts thereof as may be unsold or undistributed, to the persons to whom my residuary estate is bequeathed in and by the foregoing fourth article in the proportion of their respective interests.

I further direct that the income from the fund set apart for the benefit of my wife pursuant to the foregoing second article shall be paid to her by my said executors semiannually, and that during her lifetime they shall keep the same invested in such stocks, bonds, mortgages, or other securities as they may deem proper without regard to any limitations on investments by trustees.

I further authorize my said executors to vote in person or by proxy on the shares of stock of any corporation held by them as such executors at any meeting of the stockholders of such corporation or corporations; and with respect to the shares of stock, bonds, scrip, or other securities of any corporation which they at any time hold as such executors, including any corporation which they may cause to be incorporated as hereinbefore authorized, to consent to the merger,
lease, consolidation, or reorganization of such corporation or
42 corporations, and to make any surrender, exchange, or substitution of stock, bonds, scrip, or other securities as incident thereto; and to surrender or exchange the same for any shares of stock, bonds, scrip, or other securities issued in lieu thereof, or to retire the same, under any plan or scheme other than a merger, lease,

conolidation, or reorganization; and generally to have and exercise as to all such matters the powers of an individual owner who is under no trust obligation.

Sixth: I authorize and empower Union Trust Company of New York as trustee of the trusts hereinbefore created, and its successor or successors in the trusts, to retain as proper investments any and all securities of which such trust estate may consist as constituted by my said executors; to invest and reinvest the funds of the trust estates in real estate and in such stocks, bonds, and other securities as it or they may deem proper without reference to any limitations as to the kinds or classes of securities in which a trustee may invest trust funds; and I hereby confer upon it and them, with respect to any shares of stock, bonds, scrip, or other securities of any corporation which may at any time form a part of any of said trust estates, the same powers in the case of the merger, lease, consolidation, or reorganization of such corporation or corporations, or of any plan or scheme other than a merger, lease, consolidation, or reorganization, as are hereinbefore conferred upon my executors under like circumstances.

43 I further direct that in case of securities passing to, taken or purchased at a premium by the said trustee, its successor or successors, it and they shall not be bound to set apart any portion of the income as a sinking fund to restore or absorb such premium.

I further direct that my interest in the firm of R. T. Wilson & Co., composed of myself and my sons, Marshall Orme Wilson and Richard T. Wilson, jr., at the time of my death shall be ascertained and determined as soon after my death as is consistent with a due regard to the best interests of my estate and said firm; and that the statements or accounts rendered by my sons as the surviving partners of said firm, showing, fixing, and determining such interest, and their payment or liquidation of the same out of the assets of the firm in cash or securities or both, when approved by their co-executor, James M. Edwards, shall be binding and conclusive on all parties interested in my estate, notwithstanding the interest of my said sons in said firm and my estate, and that they are executors of this will.

Seventh: I direct that any and all transfer, succession, or legacy taxes that may be levied on my estate, or become payable in respect of any interest passing under this will, including all such taxes upon interests for life or in remainder, be paid by my executors out of the principal of my residuary estate.

Eighth: The provision herein made for my wife is to be taken and received by her in lieu and bar of her dower and dower rights
44 in any and all real estate, wherever situated, which I may own at the time of my death.

Ninth: I appoint my sons, Marshall Orme Wilson and Richard T. Wilson, jr., and my friend, James M. Edwards, of Morristown, New Jersey, executors of this my last will and testament. Upon the death of any of my said executors or of any of their successors appointed

as herein provided, I appoint in his place and stead as an executor of this my will such person as may be designated by my surviving executors by a writing under their hands filed in the office of the surrogate's court where this will shall be probated; it being my intention that there shall always be three executors engaged in the administration of my estate. I direct that my said executors shall not be required to file an inventory of my estate, and that no bond or other security shall be required of them or either of them, or of said Union Trust Company of New York as trustee of the trusts under this will.

Tenth: I hereby revoke all former wills by me made.

In witness whereof I have hereunto set my hand and seal this 3rd day of May in the year one thousand nine hundred and five.

RICHARD T. WILSON. [L. S.]

45 Signed, sealed, published, and declared by Richard T. Wilson, the testator above named, as and for his last will and testament in our presence, and we, at his request, and in his presence, and in the presence of each other have hereto subscribed our names as witnesses.

LEWIS CASS LEDYARD, Jr.,
2 East 87th Street, N. Y. City.
J. F. VAN NAME,
362 Evergreen Ave., Brooklyn, N. Y.
NORMAN L. ZENO,
148 Hancock St., Brooklyn, N. Y.

46 *Exhibit "B" to stipulation*

(Execute separate form for each tax period)

Claim for abatement of tax assessed—Credit against outstanding assessments—X Refund of taxes illegally collected—Refund of amounts paid for stamps used in error or excess

TREASURY DEPARTMENT
Internal Revenue Service
Form 843—Jan. 1922
Comptroller General U. S.
January 18, 1922

Collector's Notation
District
Account number
Date received
stamp here
Collector of Internal Revenue

Date received by
Administrative Unit.
stamp here

STATE OF NEW YORK,
County of New York, ss:

RICHARD T. WILSON,
512 Fifth Avenue, New York City.

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named,

and that the facts given below with reference to said statement are true and complete:

	Period	Year
	From	Jan. 1 1922
	To	----

1. Business in which engaged----------
2. Character of assessment or tax: Personal income tax Dec. 31, 1922.
3. Amount of assessment---------- $13,385.62
4. Reduction of tax liability requested (income and profits tax)-- $13,385.62
5. Amount to be abated---------- $
6. Amount to be refunded (or such greater amount as is legally refundable---------- $16,193.94
7. Dates of payment (see collector's receipts or indorsements of canceled checks) February 15, 1927, with interest. (If statement covers income-tax liability, items 8–11, inclusive, must be answered.)
8. District in which return (if any) was filed: New York, second district.
9. District in which unpaid assessment appears----------
10. Amount of overpayment claimed as credit---------- $
11. Unpaid assessment against which credit is asked; period from ---------- to ---------- $

48 Deponent verily believes that this application should be allowed for the following reasons:

Memorandum attached.

Signed: RICHARD T. WILSON.

Sworn to and subscribed before me this 4th day of April, 1927.

NORMAN L. ZENO,
Notary Public, New York County, N. Y.

New York County clerk's No.
New York County register's No.

MEMORANDUM IN SUPPORT OF CLAIM FOR REFUND

The taxpayer, Richard T. Wilson, claims a refund of $16,193.94 and interest, the amount of an additional tax and interest thereon assessed by the Government on his 1922 personal income following a disallowance of a deduction of $25,001.17 disallowed by the Income Tax Unit on the ground that this loss was deductible only by the estate of R. T. Wilson, sr., deceased. The tax of $13,385.62 was paid under protest on February 15, 1927, together with $2,808.32 interest thereon, following demand by the Government. The $25,001.17 sought to be deducted from the personal income of the taxpayer was the loss resulting from the sale of an undivided one-

49 fifth interest in the Commercial Building, Nos. 384–386 Broadway, New York City, inherited by Richard T. Wilson the taxpayer, from R. T. Wilson, sr.

The grounds upon which the taxpayer bases his claim to a refund of the amount paid following disallowance of the deduction are as follows:

I. The loss resulted from the sale of inherited real estate, the legal title to which and the beneficial interest in which passed directly to the heirs and devisees of R. T. Wilson, sr., of whom Richard T. Wilson was one. The loss was therefore realized personally and directly by Richard T. Wilson.

II. Any trust which may have existed with respect to the real estate sold was a trust in which the five beneficiaries owned the corpus in equal shares, were entitled to take over the corpus at any time, were entitled to the periodic distribution of all the income, including gains realized from the sale of capital assets, and was therefore a trust under which the beneficiaries were entitled to have losses from the sale of capital assets treated as distributable to them and deductible in their personal income tax returns.

FACTS

Richard T. Wilson is the son of R. T. Wilson, sr. R. T. Wilson, sr., by will dated May 3, 1905, and admitted to probate December 13, 1910, left the bulk of his property in equal shares to his five children. By the will, the executors were given the power to hold the residuary estate, consisting largely of real estate and shares of corporate
50 stock, until an advantageous sale of such property could be made. Pending such sale, the income from the property was to be collected by the executors and paid semi-annually to the five children in equal shares. In case the executors made a sale of any property under the power of sale, the proceeds were to be distributed in equal shares to the five children, except that the executors were given discretion to hold such proceeds if they consisted of property rather than cash for the purpose of converting them into a form more suitable for distribution.

In 1922 the executors sold the Commercial Building, Nos. 384–386 Broadway, New York City, at a loss of $125,000. The other losses and expenses substantially equalled the other income, so that the estate showed a net loss of $125,005.84. Each of the five children deducted one-fifth of the net loss in his personal return. Since the net loss is attributable wholly to the loss on the sale of the Commercial Building, the status of that item settles the case.

I

The loss deducted resulted from the sale of inherited real estate, the legal title to which and the beneficial interest in which descended directly to the heirs and devisees, of whom Richard T. Wilson was one. This loss was therefore realized personally and directly by Richard T. Wilson.

The executors were trustees only of a power of sale. They
51 did not hold the real estate in trust. The legal title and the beneficial interest passed directly to the devisees on the death of the decedent. I. T. 1596 (June, 1923), p. 130; In re Walker's Estate (1913), 141 N. Y. S. 325; In re Roberts' Estate (1911), 132 N. Y. S. 396. That real estate passes directly to devisees is recognized by the Bureau of Internal Revenue.

Regulations 62, article 342;
Regulations 65, article 343.

And income from such real estate or profit from the sale of such real estate is taxable to the individual devisee, not to the executor of the decedent's estate.

Regulations 62, article 342;
Regulations 65, article 343;
A. R. M. 151 C. B., June, 1922, p. 214;
S. 1374, June, 1920, C. B., p. 96.

Therefore, it seems clear that loss resulting from the sale of such estate must be deductible from the income of the devisee individually, unless the will has the effect of devising such estate to the executors as trustees. That it does not have such effect is clear under New York statutes and decisions.

By its terms the will gave the executors a power of sale. A mere power of sale does not create a trust vesting legal title to real property subject to the power in the executors. Section 97 of the real property law provides:

"A devise of real property to an executor or other trustee,
52 for the purpose of sale or mortgage, where the trustee is not also empowered to receive the rents and profits, shall not vest any estate in him; but the trust shall be legal as a power and the real property shall descend to the heirs or pass to the devisees of the testator, subject to the execution of the power."

The will of R. T. Wilson, sr., here in question, provides that pending sale of such property, the executors may collect and pay over to the residuary legatees and devisees the net income from the property. It is established by New York decisions that where the main purpose of a will is the sale and distribution of the decedent's property, the existence of a power and direction to sell are for this purpose, and the existence of a power to collect rents and profits pending sale is incidental to the main purpose, and does not have the effect of creating a trust.

Heerman v. Burt (1879), 78 N. Y. 252, 266;
Henderson v. Henderson (1889), 113 N. Y. 110;
Brooklyn Trust Company v. Kiernan (1919), 108 Misc. 452. (Affirmed 191 App. Div. 895.)

The main purpose of the provisions in question in the will of R. T. Wilson, sr., clearly was the sale and distribution of the property. The right to delay the sale was given the executors merely
53 to allow them to await a favorable market, and during that delay they were to pay the income over to the devisees. The lack of any intention of the decedent to create a trust in the executors is evidenced by the fact that he expressly created such trusts as he wished and provided for designated trustees. This case seems clearly to fall within the well established principle in New York that in such a situation the executors hold merely a power of sale and no trust, and the legal title and beneficial ownership passed directly to the beneficiaries. The power of sale could have been terminated at any time by the devisees. Being of age and competent, they could have taken over or sold the real estate.

24 Corpus Juris, 164;
Hetzel v. Barber, 69 N. Y. 1;
Prentice v. Janssen, 179 N. Y. 478;
Mellen v. Mellen, 129 N. Y. 210, 220;
Trask v. Sturgis, 170 N. Y. 482, 497;
Brooklyn Trust Company v. Kiernan, supra.

Had they made a profit on the sale, each would have been taxable individually on such profit.

Regulations 62, article 342;
Regulations 65, article 343.

Therefore, there seems no doubt of their right to deduct the loss. The mere fact that the property was in fact sold for their benefit through the exercise of a power of sale (which they could have terminated) held by executors who did not hold the legal title to the property cannot change the result.

54 II

Any trust which may have existed with respect to the real estate sold was a trust in which the five beneficiaries owned the corpus in equal shares, were entitled to take over the corpus at any time, were entitled to the periodic distribution of all the income, including gains realized from the sale of capital assets, and was therefore a trust under which the beneficiaries were entitled to have losses from the sale of capital assets treated as distributable to them and deductible in their personal income tax returns.

Assuming, however, the existence of a trust in the executors for the benefit of the devisees, the trust is not a taxable entity. It is a trust under the terms of which all of the income was distributable periodically; the proceeds of any sale of capital assets were distributable; and the beneficiaries had the power to terminate it at any time and take over the corpus. Such a trust is analogous to and should be treated for tax purposes as having the same status as a partnership. It is a trust of the character described in paragraph 4 of subdivision (a) of section 219 of the revenue act of 1921—namely, a trust all of the income of which is periodically distributable and none of the income of which was accumulated for
55 future distribution. The regulations specifically say that such a trust is governed by regulations governing partnerships.

Regulations 62, article 345.

The regulation as to partnerships provides that losses from partnership operations are deductible from the individual income of the partners.

Regulations 62, article 332.

So the Treasury Department has properly concluded that, since partners are joint owners of the partnership property and are taxable individually for their share of partnership profits, they may deduct individually their share of partnership losses. Precisely the same state of facts exist in this case. The beneficiaries are joint

owners of the property; they are taxable on the profits therefrom, and should be allowed to deduct their losses.

Section 219 of the revenue act of 1921 does not contemplate the taxation of the fiduciaries or make the trust a taxable entity where all the income of a trust is distributable income. The beneficiaries are taxed on such income. While the statute is silent as to losses from a trust which is not a taxable entity, there is no intimation against and every reason for construing the general taxing plan to allow losses to be deducted from the income of the devisees whose income is taxed on profits coming from the same trust. This result was reached by the New York Court of Appeals in a case which arose on a question of a New York income tax. The taxpayer
56 deducted from her personal income tax a loss sustained in income from a trust of which she was sole beneficiary. The court held this deduction a proper one, although the New York law then in force, like the Federal revenue act of 1921 made no provision for the deduction by the beneficiary of the losses of a trust. The court pointed out that where income is distributable, the trust is not an entity; and said that in such a case the trust and the beneficiary are merged into one entity for tax purposes. It also relied on the strong analogy to the partnership situation, and held that the taxes paid on the trust real estate were properly deducted from the individual income of the beneficiary.

People ex rel. Field v. Gilchrist (1925), 240 N. Y. 301.

It is, therefore, respectfully submitted that if any trust of the real estate existed in this case, the trust was one under the terms of which all of the income was distributable periodically, the proceeds of any sale of capital assets were distributable, and the beneficiaries had the right at any time to terminate the trust and take over the c'rpus. The statute does not make such a trust a taxable entity, and such a trust is analogous to and should be treated on the same basis as a partnership for tax purposes. Under these circumstances, the individual beneficiaries, of whom Richard T. Wilson is one, are entitled under a proper construction and application of section 219 of the revenue act of 1921, to deduct their proportionate share of the losses in their individual income-tax returns.

57 Wherefore, the taxpayer asks a refund of the sum of $13,385.62 tax and $2,808.32 interest, paid under protest following demand by the Government after a disallowance of a reduction of $25,001.17 in the taxpayer's individual income for 1922, together with interest.

In United States District Court

[Title omitted.]

Supplemental stipulation of facts

It is hereby stipulated between the parties to the above-entitled action:

The action was originally brought in the name of Richard T. Wilson, plaintiff, against Charles W. Anderson, collector of
58 internal revenue for the third district of the State of New York, defendant. Subsequently, on December 29, 1929, and after the execution of the stipulation of facts upon which the case is submitted, Mr. Wilson died, and on January 21, 1930, the present plaintiffs were substituted.

It is further stipulated that the stipulation of facts in the action entitled Richard T. Wilson against Charles W. Anderson, collector of internal revenue for the third district of the State of New York, shall be considered the stipulation of facts for the present parties, and that wherever in said stipulation of facts the words "Richard T. Wilson, plaintiff," "Richard T. Wilson, jr.," or "the plaintiff," occur, they may be treated as referring to the testator of the present plaintiffs.

Dated this 18th day of February, 1930.

ROOT, CLARK, BUCKNER and BALLANTINE,
Attorneys for Plaintiffs.

CHARLES H. TUTTLE,
Attorney for Defendant.

59 In United States District Court

[Title omitted.]

Findings of fact and conclusions of law

May 29, 1931

This action having regularly come on for trial and been heard before Honorable Frank J. Coleman at a stated term of this court, and the plaintiffs having appeared by Messrs. Root, Clark, Buckner & Ballantine, and the defendant by Charles H. Tuttle, and the case having been heard upon a stipulation of facts, and due deliberation having been had, I find and decide as follows:

60 FINDINGS OF FACT

(1) This action was originally brought in the name of Richard T. Wilson, plaintiff, against Charles Anderson, collector of internal revenue for the third district of the State of New York, defendant. Subsequently, on December 29, 1929, Richard T. Wilson, the original plaintiff, died, and on January 21, 1930 the above named plaintiffs, as executors of the estate of Richard T. Wilson, deceased, were duly substituted as plaintiffs.

At all the times hereinafter mentioned prior to December 29, 1929, the plaintiffs' testator, Richard T. Wilson, jr., was a citizen of the State of New York, residing at No. 300 Park Avenue, New York, New York, and having his principal place of business at No. 512 Fifth Avenue, New York, New York, which, after April

1, 1923, was in the third internal revenue district of the State of New York.

(2) The defendant, Charles W. Anderson, on February 15, 1927, and at all times thereafter, was, and now is, the collector of internal revenue for the third district of the State of New York, and is a resident and inhabitant of the Southern District of New York.

(3) On November 26, 1910, Richard T. Wilson, sr., died, leaving a last will and testament dated May 3, 1905, and admitted to probate by the surrogate of New York County on December 13, 1910. The said will was as follows:

61 "I, Richard T. Wilson, do make, publish, and declare this to be my last will and testament:

First: I direct my just debts and funeral expenses to be promptly paid.

Second: I direct my executors hereinafter named to set apart out of my estate a fund of two hundred and fifty thousand dollars, which I give and bequeath to my wife Melissa Clementine for and during her lifetime; and upon her death I give and bequeath the same to my lineal descendants then living per stirpes and not per capita. I make no further provision for my wife for the reason that she is already otherwise amply provided for.

Third: I direct my executors to set apart out of my estate five separate sums or funds of five hundred thousand dollars each, which I give and bequeath to Union Trust Company of New York, in trust nevertheless, to invest and reinvest the same, to collect and receive the income thereof, and to pay over the net income of one of such funds to my son Marshall Orme Wilson during his lifetime; the net income of another of such funds to my son Richard T. Wilson, jr., during his lifetime; the net income of another of such funds to my daughter Mary R. Goelet during her lifetime; the net income of another of such funds to my daughter Lelia Belle Herbert during her lifetime; and the net income of another of such funds to

62 my daughter Grace G. Vanderbilt during her lifetime; and upon the death of each of my said sons and daughters I give and bequeath the principal of the fund then so held in trust for him or her to his or her lineal descendants then living per stirpes and not per capita, and in default of any such lineal descendants, to his or her brothers and sisters then living and the lineal descendants then living of any thereof who may theretofore have died, per stirpes and not per capita.

Fourth: All the rest, residue, and remainder of my property, real, personal, and of every kind and description, which I shall own at the time of my death, I direct my executors hereinafter named to sell and convert into personalty, and to divide the proceeds thereof into five equal parts which I give and bequeath as follows:

(1) To my son Marshall Orme Wilson one of such parts to be his absolutely.

(2) To my daughter Mary R. Goelet one of such parts to be hers absolutely.

(3) One of such parts to the amount of five hundred thousand dollars I direct to be added to the trust fund of five hundred thousand dollars created in and by the foregoing third article of this will for the benefit of my son Richard T. Wilson, jr., and to be subject to the provisions of said third article, both as to the income therefrom and the disposition of the principal thereof, as if a part
63 of said original trust fund; and the balance of such part I give and bequeath to my said son Richard T. Wilson, jr., to be his absolutely.

(4) One of such parts to the amount of five hundred thousand dollars, I direct to be added to the trust fund of five hundred thousand dollars created in and by the foregoing third article of this will for the benefit of my daughter Lelia Belle Herbert, and to be subject to the provisions of said third article, both as to the income therefrom and the disposition of the principal thereof as if a part of said original trust fund; and the balance of such part I give and bequeath to my said daughter Lelia Belle Herbert to be hers absolutely.

(5) One of such parts to the amount of five hundred thousand dollars I direct to be added to the trust fund of five hundred thousand dollars created in and by the foregoing third article of this will for the benefit of my daughter Grace G. Vanderbilt, and to be subject to the provisions of said third article, both as to the income therefrom and the disposition of the principal thereof, as if a part of said original trust fund; and the balance of such part I give and bequeath to my said daughter Grace G. Vanderbilt to be hers absolutely.

Fifth: I direct my executors hereinafter named in the administration of my estate to first constitute the funds mentioned in the
64 foregoing second and third articles out of securities at their market value belonging to my estate, or the proceeds thereof, other than shares of any manufacturing or business corporation, or out of securities purchased by my executors for that purpose, at their cost; and such funds as so constituted shall be deemed to be the funds bequeathed in and by said second and third articles.

I direct my executors to next set apart out of my residuary personal estate, excepting the shares of any manufacturing or business corporation, either in securities belonging thereto, at their market value, or the proceeds thereof or out of securities purchased by my executors for that purpose, at their cost, a sum sufficient to make the addition of five hundred thousand dollars to each of the trust funds for the benefit of my son Richard T. Wilson, jr., and my daughter Lelia Belle Herbert and Grace G. Vanderbilt provided for in subdivisions 3, 4, and 5 of the foregoing fourth article and to pay to my son Marshall Orme Wilson and my daughter Mary R.

Goelet each the sum of five hundred thousand dollars as part of their respective shares in my said residuary estate. Securities so set apart for this purpose shall be accepted by the trustees of the trusts and said individual legatees as a distribution of such portion of my residuary estate.

The judgment of my said executors as to what securities shall be set apart for the constitution of the various sums or funds
65 hereinbefore in this article mentioned, and as to the market value thereof for such purpose, and as to what securities shall be purchased therefor, if any, shall be final and binding on all parties interested in my estate.

As the balance of my residuary estate will largely consist of real estate in this and other States and shares of manufacturing and business corporations which should not be sold excepting under favorable conditions, I direct my said executors to hold and manage such remaining portion of my residuary estate until, in their judgment, it can from time to time be advantageously sold and disposed of, not exceeding however a period longer than the lives of my sons Marshall Orme Wilson and Richard T. Wilson, jr., and the survivor of them, and I hereby authorize and empower my said executors within said period, to sell, convey, assign and transfer the same, or any part thereof, at such time or times as they may deem for the best interests of my estate, and upon such terms and conditions as they may deem proper, including the terms and mode of payment therefor.

I authorize and empower my said executors in their discretion, should they deem it a more advantageous method for the management and disposition of such portion of residuary estate, to cause to be organized a corporation under the laws of this or any other State, and to convey and transfer the same or any part thereof to such corporation, and receive in payment therefor the capital
66 stock of said corporation; and to hold the said capital stock until it can in their judgment be advantageously disposed of, not exceeding, however, a period longer than the lives of my sons Marshall Orme Wilson and Richard T. Wilson, jr., and the survivor of them; and to sell and dispose of the same, or any part thereof, at any time or from time to time during such period when they shall deem it most advantageous to the persons interested in my estate, and upon such terms, including the terms and mode of payment therefor, as they may deem proper.

Upon any sale or disposition being made by my said executors of such portion of my residuary estate, or of any part thereof, or of the shares of the corporation which they are hereinbefore authorized to incorporate, or any part thereof, I authorize and empower my said executors if the proceeds, or any part thereof, may in their judgment be distributed among the persons entitled thereto hereunder without any detriment to their interests to so distribute them forthwith; or in their discretion to retain the same, or any part thereof for further

conversion before distribution, not, however, beyond the period of the lives of my said sons and the survivor of them.

During the period that my said executors shall hold such portion of my residuary estate or the shares of the corporation which they are hereinbefore authorized to incorporate, or any part thereof, they shall semiannually pay over the net income thereof, or
67 of such parts thereof as may be unsold or undistributed, to the persons to whom my residuary estate is bequeathed in and by the foregoing fourth article in the proportion of their respective interests.

I further direct that the income from the fund set apart for the benefit of my wife pursuant to the foregoing second article shall be paid to her by my said executors semiannually, and that during her lifetime they shall keep the same invested in such stocks, bonds, mortgages or other securities as they may deem proper without regard to any limitations on investments by trustees.

I further authorize my said executors to vote in person or by proxy on the shares of stock of any corporation held by them as such executors at any meeting of the stockholders of such corporation or corporations; and with respect to the shares of stock, bonds, scrip or other securities of any corporation which they at any time hold as such executors, including any corporation which they may cause to be incorporated as hereinbefore authorized, to consent to the merger, lease, consolidation or reorganization of such corporation or corporations; and to make any surrender, exchange or substitution of stock, bonds, scrip or other securities as an incident thereto; and to surrender or exchange the same for any shares of stock, bonds, scrip or other securities issued in lieu thereof, or to retire the same, under any plan or scheme other than a merger, lease, consolidation or reorganization; and generally to have and
68 exercise as to all such matters the powers of an individual owner who is under no trust obligation.

Sixth. I authorize and empower Union Trust Company of New York as trustee of the trusts hereinbefore created, and its successor or successors in the trusts, to retain as proper investments any and all securities of which such trust estate may consist as constituted by my said executors; to invest and reinvest the funds of the trust estates in real estate and in such stocks, bonds and other securities as it or they may deem proper without reference to any limitations as to the kinds or classes of securities in which a trustee may invest trust funds; and I hereby confer upon it and them, with respect to any shares of stock, bonds, scrip or other securities of any corporation which may at any time form a part of any of said trust estate the same powers in the case of the merger, lease, consolidation, or reorganization of such corporation or corporations, or of any plan or scheme other than a merger, lease, consolidation or reorganization, as are hereinbefore conferred upon my executors under like circumstances.

I further direct that in case of securities passing to, taken or purchased at a premium by the said trustee, its successor or successors, it and they shall not be bound to set apart any portion of the income as a sinking fund to restore or absorb such premium.

69 I further direct that my interest in the firm of R. T. Wilson & Co., composed of myself and my sons Marshall Orme Wilson and Richard T. Wilson, jr., at the time of my death shall be ascertained and determined as soon after my death as is consistent with a due regard to the best interests of my estate and said firm; and that the statements or accounts rendered by my sons as the surviving partners of said firm, showing fixing and determining such interest, and their payment or liquidation of the same out of the assets of the firm in cash or securities or both, when approved by their coexecutor James M. Edwards, shall be binding and conclusive on all parties interested in my estate notwithstanding the interest of my said sons in said firm and my estate and that they are executors of this will.

Seventh: I direct that any and all transfer, succession, or legacy taxes that may be levied on my estate, or become payable in respect of any interest passing under this will, including all such taxes upon interest for life or in remainder, be paid by my executors out of the principal of my residuary estate.

Eighth: The provision herein made for my wife is to be taken and received by her in lieu and bar of her dower and dower rights in any and all real estate wherever situated which I may own at the time of my death.

70 Ninth: I appoint my sons Marshall Orme Wilson and Richard T. Wilson, jr., and my friend James M. Edwards, of Morristown, New Jersey, executors of this my last will and testament. Upon the death of any of my said executors or of any of their successors appointed as herein provided, I appoint in his place and stead as an executor of this my will such person as may be designated by my then surviving executors by a writing under their hands filed in the office of the surrogate's court where this will shall be probated; it being my intention that there shall always be three executors engaged in the administration of my estate. I direct that my said executors shall not be required to file an inventory of my estate, and that no bond or other security shall be required of them or either of them, or of said Union Trust Company of New York as trustee of the trusts under this will.

Tenth: I hereby revoke all former wills by me made.

In witness whereof I have hereunto set my hand and seal this 3rd day of May in the year one thousand nine hundred and five.

RICHARD T. WILSON. [L. S.]

71 Signed, sealed, published and declared by Richard T. Wilson, and testator above named, as and for his last will and testament in our presence, and we, at his request, and in his presence,

and in the presence of each other have hereto subscribed our names as witnesses.

LEWIS CASS LEDYARD, JR.,
2 East 87 Street, N. Y. City.
J. F. VAN NAME,
362 Evergreen Ave., Brooklyn, N. Y.
NORMAN L. ZENO,
148 Hancock St., Brooklyn, N. Y."

Letters testamentary were duly granted to Marshall Orme Wilson, Richard T. Wilson, jr. (the plaintiffs' testator herein), and James M. Edwards, the executors named in the will, on December 13, 1910, and at all times thereafter until November 1921, the said Marshall Orme Wilson, Richard T. Wilson, jr., and James M. Edwards were the duly qualified and acting executors under the will. In November, 1921, James M. Edwards died, and pursuant to the terms of the will, letters testamentary were granted to R. Thornton Wilson, a son of Marshall Orme Wilson, in the place and stead of James M. Edwards, and thereafter at all times herein mentioned prior to
72 the death of Richard T. Wilson, jr., on December 29, 1929, the said Marshall Orme Wilson, Richard T. Wilson, jr., and R. Thornton Wilson were the duly qualified and acting executors under the will.

(4) The five children of Richard T. Wilson, sr., namely, Marshall Orme Wilson, Mary R. Goelet, Grace T. Vanderbilt, Lelia Belle Herbert, and Richard T. Wilson, jr. (the plaintiffs' testator herein) named as distributees in said will, were all of full age and competent to manage their affairs at all times herein mentioned.

(5) Melissa Clementine Wilson, wife of Richard T. Wilson, sr., mentioned in paragraphs "second," "sixth," and "eighth" of the will, died on May 30, 1908, prior to the death of Richard T. Wilson, sr., and thereafter Richard T. Wilson, sr., was not married.

(6) At the time of his death, said Richard T. Wilson, sr., was the owner of property in the State of New York having the following values:

Real estate	$2,216,083.33
Personal Chattels	670,814.96
Corporate bonds and stocks	5,054,612.39
Interest in H. T. Wilson & Company, a partnership	8,838,658.10
Total	16,780,168.78

Included in the said real estate were the premises located at 384–6 Broadway, New York, New York, referred to herein as the
73 "Commercial Building," a six-story office building, acquired by Richard T. Wilson, sr., at a cost of $210,000.00.

Richard T. Wilson, sr., was also the owner of certain real estate outside of the State of New York having a total value of approximately $100,000.

The total debts of the estate, including commissions to be paid the executors and attorneys' fees to be paid, were as follows:

Funeral expenses	$2,910.17
Administration expenses	150,000.00
Debts of decedent	9,862.75
Commission of executors	544,355.07
Total	707,127.99

(7) In the years 1911 and 1912 the executors under the will of Richard T. Wilson, sr., created out of the personal property of the estate all of the trusts and additions thereto provided for in paragraphs "Third," "Fourth," and "Fifth" of the will.

(8) Prior to 1922 the executors under the will of Richard T. Wilson, sr., had sold or disposed of real estate other than the said Commercial building, in the following years and for the following contract prices:

74 1910 (real estate outside of New York)	$168.08
1911 (real estate outside of New York)	466.00
1912 (real estate outside of New York)	1,454.00
1913 (real estate outside of New York)	40,154.78
1914 (real estate outside of New York)	997.86
1914 (real estate in New York)	400,000.00
1915 (real estate outside of New York)	21,864.70
1915 (real estate in New York)	1,487,500.00
1916 (real estate in New York)	125,000.00
1919 (real estate outside of New York)	2,700.00
1919 (real estate in New York)	139,000.00
1920 (real estate in New York)	53,894.01
Total	2,373,099.43

(9) Prior to and during the year 1922 the executors made the following total distributions to the five residuary legatees, including the plaintiffs' testator herein, in equal shares:

75 1912 cash and securities	$5,000,000.00
1913 cash	250,000.00
1914 cash and securities	1,150,000.00
1915 cash	700,000.00
1916 cash	5,450,000.00
1917 cash and securities	1,217,736.35
1919 cash and securities	68,238.65
1920 cash	50,000.00
1922 cash	50,000.00
Total	13,935,975.00

The said distributions included the entire net income of the estate for each year in which the distributions were made. The income so distributed was reported by the said residuary legatees, including the plaintiffs' testator herein, as individuals, for Federal tax purposes, for the year 1919 and each year thereafter. For the years 1916 and 1917 the Federal income tax was withheld by the estate and paid by it. No distribution was made in the year 1918 and the Federal income tax on the income of the estate was reported by the estate and the tax paid by the estate for that year.

Prior to 1922, pursuant to the terms of the will, all of the assets of the decedent not used in setting up said trusts had been distributed or disposed of and the proceeds distributed, except the said Commercial Building, certain undeveloped real estate in Washington, D. C. known as "Wilson Park," having a value of approximately

$40,000, certain other real estate having a value of approximately $1,000, and certain personal property having a value of ap-
76 proximately $150,000. Prior to 1922, all of the debts of the decedent and of the estate, except current expenses, had been paid.

The executors did not form or cause to be formed the corporation mentioned in the fifth paragraph of the will.

The executors of the estate filed three intermediate accounts and orders of the surrogates' court of the county of New York settling such accounts were entered on or about April 20, 1917, April 8, 1919, and November 14, 1921, respectively. No other or further accounts have been filed by the executors.

(10) In 1922, said executors, acting under the will, sold the said Commercial Building for $165,000. The fair market value of such property on March 1, 1913, and the fair market value of such property at the time of the death of said Richard T. Wilson, sr., was $290,000.00. The total allowable depreciation sustained on the said property between March 1, 1913 and the date of sale was $11,700.00. Such sale resulted in a loss of $113,300.00.

In 1922, the income and expenditures of the estate were reported as follows:

77

INCOME

Interest from bank deposits, mortgages, etc	$10,825.78
Rent from Commercial Building	3,450.00
Loss on sale of Commercial Building	125,000.00
Loss on sale of stocks	4,673.75
Profit on sale of Florida lands	19.81
Dividends stock of foreign corporations	473.77
Refund of unexpired insurance premiums on Commercial Building	111.84
Total income (loss)	$114,792.55

DEDUCTIONS

Taxes paid	$2,661.42
Commissions on sale of Commercial Building	1,646.17
Notary fees on sale of Commercial Building	30.70
Salaries and rent of office in connection with administering the estate	5,875.00
Total deductions	$10,213.29
Net income (loss)	$125,005.84

(11) On or about March 14, 1923, the plaintiffs' testator, Richard T. Wilson, filed his individual Federal income tax return for
78 the calendar year 1922, which return showed a net income of $85,312.19 and a tax of $23,423.06, all of which was duly paid. In reporting said net income, one-fifth of the above loss, or $25,001.17, was deducted by the plaintiff from his gross income. It is agreed that if the plaintiff is entitled to the deductions claimed that the correct amount thereof is $22,660.00, and accordingly the amount to be recovered by the plaintiffs is $11,909.53, plus the amount of $2,499.03 interest paid thereon, totaling $14,408.63, together with interest on said total amount as provided by law.

On or about January 29, 1927, the Commissioner of Internal Revenue made an additional assessment against the plaintiff, in

the amount of $13,385.62, for the calendar year 1922, all of which additional assessment was based solely on the disallowance of the deduction of said $25,001.17.

(12) Thereafter, by notice and demand, Charles W. Anderson, the defendant herein, as collector of internal revenue for the third district of the State of New York, notified the plaintiff of said additional assessment of income tax for the calendar year 1922 in the amount of $13,385.62 and interest thereon amounting to $2,808.32, and demanded payment thereof on or before February 15, 1927.

On February 15, 1927, the plaintiff, under protest, paid the amount of said additional assessment of $13,385.62 and interest thereon of $2,808.32, making a total payment of $16,193.94, to the defendant herein as collector of internal revenue for the third district of the State of New York.

79 (13) Thereafter, on April 6, 1927, the plaintiff duly filed with the said collector of internal revenue, on Form 843, a claim for refund of said additional tax and interest in the sum of $16,193.94. On June 23, 1927, and within two years prior to the commencement of this action, the Commissioner of Internal Revenue notified the plaintiff of the total disallowance of said claim for refund.

And do further decide as

CONCLUSIONS OF LAW

1. The plaintiff's testator, Richard T. Wilson, jr., in computing his net income for the calendar year 1922 under the revenue act of 1921, was entitled to deduct from his gross income the amount of $22,660.00 as his proportionate part of the loss sustained on the sale of the Commercial Building.

2. The plaintiffs are entitled to judgment in the amount of fourteen thousand four hundred eight dollars and sixty-two cents ($14,408.62), together with interest thereon from February 15, 1927, as provided by law, with costs.

(Sgd.) FRANK J. COLEMAN,
U. S. D. J.

80 In the United States District Court

[Title omitted.]

Notice of exceptions

SIRS: Please take notice that Charles W. Anderson, the defendant herein, excepts to the decision of the court, filed in the above-entitled action on May 29, 1931, to the conclusions of law made by the court in the said decision, and to the refusal of the court to find conclusions of law as requested by the defendant, Charles W. Anderson, in the following particulars:

I. To the conclusion of law numbered and designated "1" upon the grounds that—

(a) The testator, Richard T. Wilson, sr., did not by his will expressly give his real property, including the Commercial
81 Building, to anyone, but imperatively directed his executors to sell it within two lives in being;

(b) By the will of the testator, Richard T. Wilson, sr., the executors named therein were empowered to collect the income and profits during the period they held and managed the real property, including the Commercial Building;

(c) The testator, Richard T. Wilson, sr., in his will intended that before distribution, his realty should be converted to personalty;

(d) The will of the testator, Richard T. Wilson, sr., created a residuary trust of his realty, including the Commercial Building, by virtue of the executors' control over the real property and the income therefrom, pending its sale and distribution, and said trust was valid under the New York real property law, section 96, subdivision 2, as one to sell for the benefit of legatees;

(e) The will of the testator, Richard T. Wilson, sr., created a valid residuary trust of his real property, including the Commercial Building, under the New York real property law, section 96, subdivision 3, for the receipt of the rents and profits of said real property, and the application of them to the use of specified legatees during their lives;

(f) Because of the existence of a valid trust of the real property, including the Commercial Building, of the testator, Richard T. Wilson, sr., under his will, the loss sustained upon the sale
82 of the Commercial Building in 1922 was not, in a proportionate amount, deductible from the gross income of the beneficiary, Richard T. Wilson, jr., under the internal revenue laws.

II. To the conclusion of law numbered and designated "2" upon the same grounds as those set forth in paragraph "1" herein.

To the refusal of the court to find as requested in the proposed conclusions of law submitted by the defendant, Charles W. Anderson as follows:

III. The defendant, Charles W. Anderson, excepts to the refusal of the court to make conclusions of law as requested in paragraphs "1," "2," "3," "4," "5," "6," "7," and "8" of the conclusions of law proposed and submitted by him to the court.

Dated, New York, June 2, 1931.

GEORGE Z. MEDALIE.

United States Attorney, Southern District of New York, Attorney for Defendant; office and P. O. address, Old Post Office Building, Borough of Manhattan, city of New York.

To:

ROOT, CLARK & BUCKNER, Esqs.,
Attorneys for Plaintiffs, 31 Nassau Street, Borough of Manhattan, New York City.

83 In United States District Court

[Title omitted.]

Defendant's notice of settlement of conclusions of law

SIRS: Please take notice that proposed conclusions of law of which the annexed is a copy will be presented for settlement to the Honorable Frank J. Coleman, United States District Judge for the Southern District of New York, at the office of the clerk of the District Court, Southern District of New York, at the old Post Office Building, Borough of Manhattan, city of New
84 York, on the 29th day of May, 1931, at 10.30 o'clock in the forenoon of that day.

Dated, New York City, May 28, 1931.

GEORGE Z. MEDALIE,

United States Attorney, Southern District of New York, Attorney for Defendant; office and post office address, Old Post Office Building, Borough of Manhattan, New York City.

To:

ROOT, CLARK & BUCKNER, Esqs.,
Attorneys for Plaintiffs, 31 Nassau Street, Borough of Manhattan, New York City.

85 At a stated term of the United States District Court, held in and for the Southern District of New York, at the Old Post Office Building, in the Borough of Manhattan, city of New York, on the day of , 1931

Present: Honorable Frank J. Coleman, United States district judge.

L 41/136

MARIAN STEEDMAN WILSON, ROBERT GOELET and HARLEN G. RUBERT, as executors of the Estate of Richard T. Wilson, deceased, plaintiffs

against

CHARLES W. ANDERSON, COLLECTOR OF INTERNAL REVENUE FOR THE Third District of New York, defendant

This action having regularly come on for trial and having been heard before Honorable Frank J. Coleman, United States district judge, at a stated term of this court, and the plaintiffs having appeared by Root, Clark, Buckner & Ballantine, Esqs., their attorneys, and the defendant having appeared by Honorable Charles H. Tuttle, then United States attorney for the Southern District
86 of New York, and now appearing by Honorable George Z. Medalie, United States attorney for the Southern District

of New York, and the case having been heard upon a stipulation of facts, and no objection having been made to the findings of fact proposed by the attorneys for the plaintiffs, and the plaintiffs having submitted proposed conclusions of law to which the defendant objects, and the defendant having submitted proposed conclusions of law, and due deliberation having been had, I find and decide as follows:

FINDINGS OF FACT

I find the facts as submitted in the plaintiffs' proposed findings of fact under their notice of settlement of said findings of fact, dated New York, May 26, 1931.

And do further decide as

CONCLUSIONS OF LAW

1. The testator, Richard T. Wilson, sr., did not by his will expressly give his real property, including the Commercial Building, to anyone, but imperatively directed his executors to sell it within two lives in being.

2. By the will of the testator, Richard T. Wilson, sr., the executors named therein were empowered to collect the income and profits during the period they held and managed the real property, including the Commercial Building.

87 3. The testator, Richard T. Wilson, sr., in his will intended that before distribution his realty should be converted to personalty.

4. The will of the testator, Richard T. Wilson, sr., created a residuary trust of his realty, including the Commercial Building, by virtue of the executors' control over the real property and the income therefrom, pending its sale and distribution, and said trust was valid under the New York real property law, section 96, subdivision 2, as one to sell for the benefit of legatees.

5. The will of the testator, Richard T. Wilson, sr., created a valid residuary trust of his real property, including the Commercial Building, under the New York real property law, section 96, subdivision 3, for the receipt of the rents and profits of said real property, and the application of them to the use of specified legatees during their lives.

6. Because of the existence of a valid trust of the real property, including the Commercial Building, of the testator, Richard T. Wilson, sr., under his will, the loss sustained upon the sale of the Commercial Building in 1922 was not, in a proportionate amount, deductible from the gross income of the beneficiary, Richard T. Wilson, jr.

7. The plaintiffs' testator, Richard T. Wilson, jr., in computing his net income for the calendar year 1922 under the revenue act of 1921, was not entitled to deduct from his gross income the

88 amount of $22,660 as his proportionate part of the loss sustained in the sale of the Commercial Building by the executors of Richard T. Wilson, sr., in 1922.

8. The defendant is entitled to judgment dismissing the complaint on the merits, together with costs.

Refused 5/29/31. F. J. C.

_____,
U. S. D. J.

Plaintiffs' exceptions to the above conclusions of law noted and allowed.

_____.
U. S. D. J.

89 In United States District Court

[Title omitted.]

Stipulation and order settling bill of exceptions

It is hereby stipulated and agreed that the foregoing contains all of the testimony, exhibits, facts stipulated, findings of fact and conclusions of law made by the court, proposed conclusions of law submitted by the defendant, and exceptions made at the trial of and filed in this case, and that the same may be settled and ordered on file as the bill of exceptions herein.

Dated, New York, December 18th, 1931.

ROOT, CLARK & BUCKNER,
Attorneys for Plaintiffs.
GEORGE Z. MEDALIE,
United States Attorney, Attorney for Defendant.

90 Upon the foregoing stipulation, it is ordered that the foregoing may be and hereby is settled and ordered on file as the bill of exceptions herein.

Dated, New York, December 18th, 1931.

FRANK J. COLEMAN,
U. S. D. J.

In United States District Court, Southern District of New York

MARIAN STEEDMAN WILSON, ROBERT GOELET and HARLEN G. RUBERT, executors of the estate of Richard T. Wilson, deceased, plaintiffs

against

CHARLES W. ANDERSON, COLLECTOR OF INTERNAL REVENUE FOR THE third district of New York, defendant

Memorandum opinion

At law. Action tried upon stipulation of facts without jury to recover an additional income tax of $11,909.59 and interest, paid by Richard T. Wilson, jr., the plaintiffs' testator for the year 1922.

91 Root, Clark, Buckner & Ballentine (George E. Cleary; Clark T. Brown, of counsel), attorneys for the plaintiffs.

Robert E. Manley (W. H. Schulman, of counsel), acting United States attorney.

F. J. Coleman, J.

MEMORANDUM

Richard T. Wilson, sr., died on November 26, 1910, leaving as part of his residuary estate the Commercial Building in New York City, having a value at that time of $290,000. His son, Richard T. Wilson, jr., who is the plaintiffs' testator, was one of the residuary legatees, and when the Commercial Building was sold in 1922 by the executors of the father's estate at a loss of $113,305.84, Richard T. Wilson, jr., deducted his proportionate part of the loss, which is now conceded to be $22,660, from his total income reported for that year. The Commissioner of Internal Revenue disallowed the deduction and assessed an additional tax on account of it, which was paid under protest and is now sought to be recovered. If the deduction was proper, it is conceded plaintiff is entitled to recover $11,909.59, and $2,499.03 interest paid, together with interest on both amounts, as provided by law.

The question presented is whether the residuary legatees under the father's will had the right to deduct from their individual incomes the loss sustained in the sale of the Commercial Building, or whether the deduction could only be made from the total
92 income reported by the father's executors. Concededly, the residuary legatees had the right to do so if the property was left to them directly and they became the holders of the legal title; subject to a mere power of sale in the executors; but the Government contends that the property was given to the persons named as executors in trust for the residuary legatees. The plaintiffs deny that there was any trust, and contend that even if there were one, its terms were such that the legatees became immediately entitled to the income and proceeds from the property, and so had the right to deduct the loss in their individual returns.

The first problem is the construction of the father's will to determine whether the residuary estate was left in trust, and if so, upon what terms. He left a net estate of approximately $16,000,000 consisting of various parcels of real estate valued at about $2,300,000 and personally worth about $14,000,000. His general plan was to set up spendthrift trusts for each of his five children in the amount of $500,000 in some instances and of $1,000,000 in others, and to divide the residuum of the estate among them. He made a direct and express bequest of the trust funds to a named trustee, which was not one of the executors, and specified the terms of the trust, but as to the residuum he used the following words:

"All the rest, residue, and remainder of my property, real, personal, and of every kind and description, which I shall own at the

time of my death, I direct my executors hereinafter named to
93 sell and convert into personalty, and to divide the proceeds thereof into five equal parts, which I give and bequeath as follows:

"(1) To my son Marshall Orme Wilson one of such parts to be his aboslutely.

"(2) To my daughter, Mary R. Goelet, one of such parts to be hers absolutely.

"(3) One of such parts to the amount of $500,000 I direct to be added to the trust fund of $500,000 created in and by the foregoing third article of this will for the benefit of my son, Richard T. Wilson, jr., and to be subject to the provisions of said third article, both as to the income therefrom and the disposition of the principal thereof, as if a part of said original trust fund; and the balance of such part I give and bequeath to my said son, Richard T. Wilson, jr., to be his absolutely."

Provisions similar to that for Richard T. Wilson, jr., were made for the remaining two children.

The testator was concerned about the nature of his property, which consisted of real estate and of the stock of manufacturing and business corporations. He desired to provide not only for its division among his children, but also for protection against its loss of value after his death. He, accordingly, directed that the spendthrift trusts be constituted out of securities which were not the stock of business or manufacturing corporations and provided:

94 "As the balance of my residuary estate will largely consist of real estate in this and other States and shares of manufacturing and business corporations which should not be sold excepting under favorable conditions, I direct my said executors to hold and manage such remaining portion of my residuary estate until in their judgment it can from time to time be advantageously sold and disposed of, not exceeding however a period longer than the lives of my sons, Marshall Orme Wilson and Richard T. Wilson, jr., and the survivor of them, and I hereby authorized and empower my said executors within said period, to sell, convey, assign and transfer the same, or any part thereof, at such time or times as they may deem for the best interests of my estate, and upon such terms and conditions as they may deem proper, including the terms and mode of payment therefor."

Furthermore, in regard to this balance of the residuum he authorized the executors in their discretion to organize a holding corporation and to retain its stock until in the judgment of the executors it could be advantageously disposed of, but not longer than the two specified lives in being. The executors, however, never organized such corporation.

The only other provisions which need be considered in detail read as follows:

"Upon any sale or disposition being made by my said
95 executors of such portion of my residuary estate, or of any part thereof, or of the shares of the corporation which they are hereinbefore authorized to incorporate, or any part thereof, I authorize and empower my said executors if the proceeds, or any part thereof, may in their judgment be distributed among the persons entitled thereto hereunder without any detriment to their interests to so distribute them forthwith; or in their discretion to retain the same, or any part thereof, for further conversion before distribution, not, however, beyond the period of the lives of my said sons and the survivor of them.

"During the period that my said executors shall hold such portion of my residuary estate or the shares of the corporation which they are hereinbefore authorized to incorporate, or any part thereof, they shall semiannually pay over the net income thereof, or of such parts thereof as may be unsold or undistributed, to the persons to whom my residuary estate is bequeathed in and by the foregoing fourth article in the proportion of their respective interests."

Three executors were appointed, including two of the residuary legatees, and they were given power to vote all stock "held by them as such executors * * *; and generally to have and exercise as to all such matters the power of an individual owner who is under no trust obligation."

It thus appears that the testator did not expressly give the real propery to anyone, but imperatively directed his executors to
96 sell it within two lives in being. He did, however, make a present gift of the proceeds to his five children "absolutely." Pending the sale, which might in the discretion of the executors be long deferred (it was twelve years in the case of the Commercial Building) the executors were directed to "hold and manage" the property and to "semiannually pay over the net income thereof" to the children. While there was no express provision to that effect, it must be held that the executors were empowered to collect the income and profits during the period they held and managed the property. Upon a sale they were authorized to distribute the proceeds forthwith or in their discretion to retain them "for further conversion before distribution," but not beyond the two lives, in the meanwhile distributing the net income from such proceeds semiannually.

It is clear that the testator did not have the specific idea of a trust in mind when making the provisions for his residuary estate. Even if the legal effect of those provisions was to create a trust, it is manifest that the testator did not in his own mind apply that name to the result. The will does create trusts in the usual form by expressly giving the trust funds to the trusts upon specified conditions; but in regard to the residuary the only words of gift are of the proceeds to the children "absolutely," and the persons named as executors are never referred to as trustees.

It remains therefore to be determined whether the provisions necessitate a ruling that a trust of the residuary estate was created
97 contrary to the testator's classification. It must be recognized that he had no desire to postpone the distribution of his residuary estate nor his children's absolute dominion over it. He intended that before distribution his realty should be converted to personalty, and, probably, that his stock of manufacturing and business corporations be turned into less speculative investments; and his purpose in making the various provisions which cause the present doubt was merely to give the executors such powers in the conversion and distribution that a sacrifice of value might be avoided, and to provide for the distribution of the income pending the distribution of the corpus. Defendant emphasizes the provision that the executors may retain the proceeds of any sale if in their judgment an immediate distribution would not be for the best interests of the legatees; but that retention was limited to the purpose of "further conversion before distribution."

I feel constrained to hold that the will created a residuary trust, whatever the testator's idea of the nomenclature may have been, because of the executor's control over the property and the income therefrom pending its sale and distribution; and that as to the real estate, the trust was valid under the New York real property law, section 96, subdivision 2, as one to sell for the benefit of legatees. It is impossible for me to see any essential difference between the present case and Morse v. Morse, 85 N. Y. 53, which apparently has never been overruled or criticized and which establishes the law of New York upon the point.

Notwithstanding the existence of the trust, I believe the loss
98 was deductible from the gross income of the beneficiaries. While it is true that under the federal statutes and regulations a trust estate and its beneficiaries are to some extent separate tax entities, in the present case the beneficiaries had so immediate an interest in the trust property that a loss of the latter may properly be held to have been suffered by them. They were the beneficial owners not only of the income, but of the corpus and that ownership was unqualified and "absolute." They were entitled to a practically immediate distribution not only of the income, but of the proceeds of the sale of the real property subject only to the right of the executors to reserve such part of the proceeds as they thought should be further converted before distribution. Under the revenue act of 1921, section 219, the income was chargeable to the beneficiaries and the tax thereon payable by them even if there had been no distribution of it, because under the terms of the will the beneficiaries were entitled to a distribution. It is difficult to see why that principle should not apply to capital gains and losses where the same beneficiaries are entitled to a distribution of the corpus.

While the facts in Merle-Smith v. Commissioner, 42 Fed. 2d 837, are dissimilar to those of the present case, I think the sentiments therein expressed are applicable. The plaintiff here has real interest

in the corpus and possesses every important attribute of ownership to even greater extent than the petition in that case. Monger v. Commissioner, 16 B. T. A. 167 and People ex rel. Field v. Gilchrist, 240 N. Y. 301, also tend to support this ruling. See, however,
99 Kleins Federal Income Taxation, p. 1169 and its 1931 Supplement, p. 307. Judgment is accordingly directed for the plaintiffs in the sum of $14,408.62 with interest as provided by law and costs.

Settle findings on notice.

March 19, 1931.

U. S. D. J.

In United States District Court, Southern District of New York

L 41/136

Marian Steedman Wilson, Robert Goelet and Harlen G. Rubert, as executors of the estate of Richard T. Wilson, deceased, plaintiffs

against

Charles W. Anderson, Collector of Internal Revenue for the Third District of New York, defendant

Judgment

The issues in this action having been duly brought on for trial before Honorable Frank J. Coleman, district judge, and the action tried upon a stipulation of facts without a jury, a jury
100 having been duly waived, at a term of this court held at the courthouse in and for the southern district of New York, and the plaintiffs having appeared by Messrs. Root, Clark, Buckner & Ballantine, and the defendant by Charles H. Tuttle, Esq., United States district attorney, and the issues having been duly tried, and the court having directed judgment for the plaintiffs in the sum of fourteen thousand four hundred eight dollars and sixty-two cents ($14,408.62), plus interest from February 15, 1927, and costs, and a decision having been duly filed herein, and an order for judgment having been duly filed herein on June 5th, 1931, it is

Adjudged and decreed, that the plaintiffs, Marian Steedman Wilson, Robert Goelet, and Harlem C. Rubert, as executors of the estate of Richard T. Wilson, deceased, recover of the defendant, Charles W. Anderson, collector of internal revenue for the third district of New York, the sum of fourteen thousand four hundred eight dollars and sixty-two cents ($14,408.62), with interest thereon according to law, and the plaintiffs' costs which have been taxed at $30, and that the plaintiffs have execution therefor.

Judgment entered this 9th day of June, 1931.

CHARLES WEISER,
Clerk, U. S. D. C., S. D. N. Y.

101 In United States District Court

[Title omitted.]

Petition for appeal and order of allowance

To the Honorable the Judges of the United States District Court for the Southern District of New York:

Charles W. Anderson, the above-named defendant, feeling himself aggrieved by a judgment made and entered herein on the 9th day of June, 1931, in the sum of $14,408.62, with interest according to law, plus $30 costs as taxed, in favor of the above-named plaintiffs, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Second Circuit, for the reasons specified in the assignment of errors which is filed herewith, and prays for an order allowing petitioner to prosecute said appeal, and that a transcript of record, papers, and proceedings
102 upon which said judgment was made and entered may be duly authenticated and sent to the Circuit Court of Appeals for the Second Circuit, and that a citation be issued as provided by law.

Dated, New York, August 28, 1931.

GEORGE Z. MEDALIE,
United States Attorney for the Southern District of New York; Office & P. O. address, Old Post Office Building, Borough of Manhattan, New York City.

It is ordered that the appeal, as above prayed for, be and the same hereby is allowed.

Dated, New York, August 28, 1931.

J. W. MACK,
U. S. D. J.

103 In United States District Court

[Title omitted.]

Assignment of errors

The above-named defendant, Charles W. Anderson, collector of internal revenue for the third district of New York, for his assignment of errors, respectfully alleges that:

First: The District Court erred in holding that the plaintiff's testator, Richard T. Wilson, jr., in computing his net income for the calendar year 1922 under the revenue act of 1921, was entitled to deduct from his gross income the sum of $22,660 as his proportionate share of the loss sustained on the sale of a certain building called the "Commercial Building."

Second: The District Court erred in holding that the plaintiffs were entitled to judgment against the defendant in the sum

104 of $14,408.62, together with interest thereon from February 15, 1927, according to law, with costs as taxed of $30.

Third: The District Court erred in not holding as a conclusion of law that the testator, Richard T. Wilson, sr., did not by his will expressly give his real property, including the Commercial Building, to anyone, but imperatively directed his executors to sell it within two lives in being.

Fourth: The District Court erred in not holding that by the will of the testator, Richard T. Wilson, sr., the executors named therein were empowered to collect the income and profits during the period they held and managed the real property, including the Commercial Building.

Fifth: The District Court erred in not holding that the testator, Richard T. Wilson, sr., in his will intended that before distribution, his realty should be converted to personalty.

Sixth: The District Court erred in not holding that by the will of the testator, Richard T. Wilson, sr., there was created a residuary trust of his realty, including the Commercial Building, by virtue of the executors' control over the real property and the income therefrom, pending its sale and distribution, and said trust was valid under the New York real property law, section 96, subdivision 2, as one to sell for the benefit of legatees.

105 Seventh: The District Court erred in not holding that by the will of the testator, Richard T. Wilson, sr., he created a valid residuary trust of his real property, including the Commercial Building, under the New York real property law, section 96, subdivision 3, for the receipt of the rents and profits of said real property, and the application of them to the use of specified legatees during their lives.

Eighth: The District Court erred in not holding that because of the existence of a valid trust of the real property, including the Commercial Building, of the testator, Richard T. Wilson, sr., under his will, the loss sustained upon the sale of the Commercial Building in 1922 was not, in a proportionate amount, deductible from the gross income of the beneficiary, Richard T. Wilson, jr.

Ninth: The District Court erred in denying the conclusions of law numbered "1" to "8," inclusive, as proposed by the defendant.

Tenth: The District Court erred in not holding that the defendant is entitled to judgment dismissing the complaint on the merits, together with costs.

Wherefore, the defendant respectfully prays that the judgment of the United States District Court for the Southern District of New York, made and entered herein on the 9th day of June, 1931, be reversed and that the said District Court be directed to enter judgment dismissing the complaint on the merits; and in

106 order that the foregoing assignment of errors be a part of the record, the defendant presents the same to this court and prays that such disposition may be made thereof as is in accordance

with the law and the Constitution of the United States in such case made and provided, all of which is respectfully submitted.

Dated, New York, August 28th, 1931.

GEORGE Z. MEDALIE,
United States Attorney for the Southern District of New York; office & P. O. address, Old Post Office Building, Borough of Manhattan, New York City.

107 [Citation in usual form omitted in printing.]

108 In United States Circuit Court of Appeals for the Second Circuit

[Title omitted.]

Stipulation as to record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the United States District Court for the Southern District of New York in the above-entitled action, as agreed upon by the parties.

Dated: New York, N. Y., January 9, 1932.

GEORGE Z. MEDALIE,
United States Attorney,
Attorney for Defendant-Appellant.

ROOT, CLARK & BUCKNER,
Attorneys for Plaintiffs-Appellees.

109 [Clerk's certificate to foregoing transcript omitted in printing.]

110 In United States Circuit Court of Appeals for the Second Circuit

No. 319—October term, 1931

Argued March 22, 1932. Decided July 11, 1932

Appeal from the District Court of the United States for the Southern District of New York

Before L. Hand, Swan, and Augustus N. Hand, Circuit Judges

MARIAN STEEDMAN WILSON, ROBERT GOELET AND HARLEM G. ROBERT, as Executors of the Estate of Richard T. Wilson, jr., plaintiffs-appellees

v.

CHARLES W. ANDERSON, COLLECTOR OF INTERNAL REVENUE FOR THE Third District of New York, defendant-appellant

From a judgment that plaintiffs recover $14.438.62 from the defendant collector of internal revenue representing an additional

assessment of income taxes paid by plaintiff's testator under protest, the defendant appeals. Reversed.

George Z. Medalie, U. S. atty., of New York City (Walter H. Schulman, asst. U. S. atty., of New York City, of counsel), for defendant-appellant.

Root, Clark & Buckner, of New York City (George E. Cleary, of New York City, and Clark T. Brown, of Washington, D. C., of counsel), for plaintiffs-appellees.

Opinion

AUGUSTUS N. HAND, *Circuit Judge.*

The question before us is whether the plaintiffs' testator, Richard T. Wilson, jr., was entitled to claim a deduction in his personal income tax return for 1922 by reason of a sale made in that year at a loss by the executors of the will of his father, Richard T. Wilson, sr. The sale was of real estate, in which the son had an undivided fifth interest. The Commissioner of Internal Revenue disallowed the loss which Wilson had claimed in his return and demanded payment of an additional tax based on the exclusion of the deduction in making the assessment. The taxpayer paid the additional assessment, with interest, under protest, and brought this action against the collector to recover the amount of the payment. It is conceded that, if the deduction was proper, Wilson's executors, who because of his death after bringing this action were substituted as parties plaintiff, were entitled to recover back the additional tax amounting to $11,909.59 and $2,499.03, the interest he had paid, together with interest on both amounts since the payment.

If the real estate was devised to the taxpayer directly, subject only to a mere power of sale by the executors of his father's will, there can be no doubt that he was entitled to the deduction claimed in his return. The plaintiffs insist that this is the effect of the will, but the Government contends that the executors were trustees for Wilson, and that as fiduciaries they were the persons responsible for making the return for a trust estate as a taxable entity. If so, they could not have availed themselves of the deduction, for there was no income in their hands from which it could be taken.

The will of Richard T. Wilson, sr., after giving $500,000 (by the third article) in trust for Richard T. Wilson, jr., contained a residuary clause under which the real estate in question was disposed of as follows:

111 "All the rest, residue, and remainder of my property, real, personal, and of every kind and description, which I shall own at the time of my death, I direct my executors hereinafter named to sell and convert into personalty, and to divide the proceeds thereof into five equal parts which I give and bequeath as follows:

"(3) One of such parts to the amount of $500,000 I direct to be added to the trust fund of $500,000 created in and by the foregoing third article of this will for the benefit of my son, Richard T.

Wilson, jr., and to be subject to the provisions of said third article, both as to the income therefrom and the disposition of the principal thereof, as if a part of said original trust fund; and the balance of such part I give and bequeath to my said son, Richard T. Wilson, jr., to be his absolutely."

After making provision for the constitution and investment of trusts for his wife and children out of securities other than stocks of business and manufacturing corporations which he held, the will went on to say:

"As the balance of my residuary estate will largely consist of real estate in this and other States and shares of manufacturing and business corporations which should not be sold excepting under favorable conditions, I direct my said executors to hold and manage such remaining portion of my residuary estate until in their judgment it can from time to time be advantageously sold and disposed of, not exceeding however a period longer than the lives of my sons, Marshall Orme Wilson and Richard T. Wilson, jr., and the survivor of them, and I hereby authorize and empower my said executors within said period, to sell, convey, assign, and transfer the same, or any part thereof, at such time or times as they may deem for the best interests of my estate, and upon such terms and conditions as they may deem proper, including the terms and mode of payment therefor. * * *

"Upon any sale or disposition being made by my said executors of such portion of my residuary estate, or any part thereof, * * * I authorize and empower my said executors if the proceeds, or any part thereof, may in their judgment be distributed among the persons entitled thereto hereunder without any detriment to their interests to so distribute them forthwith; or in their discretion to retain the same, or any part thereof, for further conversion before distribution, not, however, beyond the period of the lives of my said sons and the survivor of them.

"During the period that my said executors shall hold such portion of my residuary estate * * * they shall semiannually pay over the net income thereof, or of such parts thereof as may be unsold or undistributed, to the persons to whom my residuary estate is bequeathed * * * in the proportion of their respective interests."

In the years 1911 and 1912 the executors of Richard T. Wilson, sr., set up all of the trusts and additions thereto (such as the trust of $500,000 for Richard T. Wilson, jr., and the additional trust of $500,000 for him) as directed by the will. Prior to 1922 all of the assets of the decedent not used in setting up these trusts had been distributed except the real estate above mentioned known as the Commercial Building in New York City, and certain other real estate of a value of approximately $41,000, and certain personal property of a value of approximately $150,000. In 1922 the executors sold the Commercial Building for $165,000, and in that year distributed $50,000 of funds in their hands among the five residuary legatees. This sale involved a loss of $113,300 based upon the value

of the building at the date of testator's death. One-fifth of this loss applicable to the interest of Richard T. Wilson, jr., was $22,660. The latter sum he attempted to deduct from his individual income for the year 1922 as a loss incurred during that year, and it was allowed by the trial court as a proper deduction.

The deduction is defended on behalf of the taxpayer upon the theory that there was no trust affecting the real estate but a mere power of sale, and that, if there was any trust, it was one to sell and distribute. We cannot agree with either contention. It is true that the will directed a sale and doubtless effected an equitable conversion of the real estate. But it also authorized the executors either to distribute the proceeds, if such distribution was not detrimental to the interest of the testator's children, "or in their discretion to retain the same, or any part thereof, for further conversion before distribution, not, however, beyond the period of the lives" of two of his sons. The will also directed the executors to "hold and manage" the real estate in question as well as other portions of the residuary estate until it could in the judgment of the executors
112 be "advantageously sold and disposed of," subject to the above limitation of two lives. It further provided that for the period during which the executors might hold any portion of the residuary estate they should semiannually pay over the net income "of such parts thereof as may be unsold or undistributed, to the persons to whom (the) residuary estate is bequeathed * * * in the proportion of their respective interests." It is clear from the foregoing that the will created trusts in the residuary estate. The executors were not only directed to "hold and manage" it pending a sale, but were also authorized, should they think best, to retain the proceeds of any of it which they might sell during a period measured by lives and to pay over the income of any parts undistributed. Such provisions go far beyond a mere direction to receive and apply income pending a sale and create trusts in such part of the proceeds of sale as the executors may choose to hold. The case is entirely different from a bare trust to sell and distribute and to collect the income meanwhile. Munger v. Commissioner, 16 B. T. A. 168.

We are not disposed to interpret the provision that the executors may retain proceeds of sale "for further conversion before distribution" as limited to cases where sales might be made other than for cash. It is much more reasonable to suppose that the words "further conversion" related as well to the reinvestment of cash derived from sales. Otherwise it is hard to explain the clause directing the executors to pay over semiannually the net income of such parts of the residuary estate as might be "sold or undistributed" and the provision empowering the executors to hold the rest and pay over the income during such a long period as two lives in being.

We conclude that the will created trusts in the residuary estate of which the Commercial Building formed a part and that these trusts

were to continue irrespective of any sales so far as the executors chose to hold rather than to distribute the proceeds. The record indicates that after the sale in question the executors continued to hold at least all but $50,000 of the $165,000 realized from the sale of the Commercial Building. To what extent any part of the $50,000 is to be allocated to the proceeds of that property we need not say, for in any event the greater part of the proceeds was not distributed, but remained in the residuary trusts after the year 1922.

If the sale of Commercial Building had resulted in a profit rather than a loss, so far as the proceeds were retained for future distribution and were not distributed, section 219 (a) (3) of the revenue act of 1921 (42 Stat. 246) would have been applicable. Under section 219 (a) (3) and 219 (c) the executors would have had to make the returns as fiduciaries and to pay the tax on such profit as inhered in the proceeds retained. We think that the same clauses would necessarily require any losses incurred in transactions entered into for profit and affecting proceeds retained to be deducted from the executors' return. Section 214 (a), 42 Stat. 239.

So far as the proceeds from the sale were distributed in 1922 to the legatees, the case would fall within section 219 (a) (4) which covers "income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals." Under section 219 (d) any income thus distributed should be included in computing the net income of each beneficiary. Losses affecting the amount distributed must be treated in the same way. The word "periodically" in section 219 (a) (4), when taken in connection with the words "whether or not at regular intervals," means no more than at a time fixed by the will or by the election of the executors to distribute in accordance with its provisions. Barton v. Commissioner, 5 B. T. A. 1008.

Article 342 of Regulations 62 provides that: "Where under the terms of the will * * * the trustee may in his discretion distribute the income or accumulate it, the income is taxed to the trustees irrespective of the exercise of the discretion." This article is said to deprive the beneficiary of the right to make any deduction for the loss even so far as it inhered in distributions actually made. But this regulation can hardly be applied to the present case, for it seems contrary to the provisions of section 219 (a) (4), 219 (d), and 219 (e). Appeal of Scripps, 1 B. T. A. 491; Barton v. Commissioner, 5 B. T. A. 1008; Appeal of Sprague, 8 B. T. A. 173; Henn v. Commissioner, 8 B. T. A. 190

To the extent that there was a distribution to the taxpayer of any part of the proceeds of the Commercial Building, he suffered a proportionate part of the loss incurred in the sale The distribution was of his capital investment, and any loss or impairment of it affected his net income just as a gain would have affected it in a favorable way had there been a profit. To this extent he may deduct
113 the loss from his individual return. Brewster v. Gage, 280 U. S. 327, 50 S. Ct. 115, 74 L. Ed. 457.

It is said in the Government brief that "of $165,000 realized on the sale of the Commercial Building in 1922 only $50,000 was distributed to the residuary legatees." While we are not clear from the record to what extent this $50,000 was derivable either directly or by apportionment from the proceeds of sale of the Commercial Building, we hold that the taxpayer was entitled to deduct from his individual return that part of one-fifth of the total loss of $113,300 represented by the ratio which the distribution to the legatees in 1922 applicable to the proceeds of sale bears to the $165,000 realized. If the $50,000 was all derived from the proceeds of sale, the taxpayer would be entitled to deduct from his return $\frac{50,000}{165,000}$ of $\frac{\$113,300}{5}$ or $6,866.66; if it was not all so derived, the ratio employed would result in a smaller deduction.

The trial court deducted one-fifth of the entire loss of $113,300 incurred in the sale of the Commercial Building. This was error, for only the amount applicable to such part of the proceeds as was distributed to the taxpayer in 1922 may be deducted. That amount must be computed and fixed upon a new trial.

Judgment reversed.

114 In United States Circuit Court of Appeals, Second Circuit Circuit

MARION STEEDMAN WILSON ET AL., AS EXECUTORS, ETC., PLAINTIFFS-appellees

vs.

CHARLES W. ANDERSON, AS COLLECTOR, ETC., DEFENDANT-APPELLANT

Judgment

Filed July 18, 1932.

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed with costs.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

WM. PARKIN, *Clerk.*

116 [Clerk's certificate to foregoing transcript omitted in printing.]

115 [File endorsement omitted.]

117 Supreme Court of the United States

No. 460—October term, 1932

CHARLES W. ANDERSON, COLLECTOR OF INTERNAL REVENUE FOR THE Third District of New York, Petitioner

vs.

MARIAN STEEDMAN WILSON, ROBERT GOELET AND HARLEM G. RUBERT, as Executors of the Estate of Richard T. Wilson, jr., deceased

Order allowing certiorari

Filed November 21, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

118 Supreme Court of the United States

No. 461—October term, 1932

MARIAN STEEDMAN WILSON, ROBERT GOELET AND HARLEM G. RUBERT, as Executors of the Estate of Richard T. Wilson, jr., deceased, petitioners

vs.

CHARLES W. ANDERSON, COLLECTOR OF INTERNAL REVENUE FOR THE Third District of New York

Order allowing certiorari

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The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(Indorsement on cover:) Enter Attorney General. File No. 37157 37158. U. S. Circuit Court of Appeals, Second Circuit, Term No. 460. Charles W. Anderson, Collector of Internal Revenue for the Third District of New York, petitioner, vs. Marian Steedman Wilson, Robert Goelet, and Harlem G. Rubert, as Executors of the Estate of Richard T. Wilson, jr., deceased. Enter George E. Cleary. Term No. 461. Marian Steedman Wilson, Robert Goelet and Harlem G. Rubert, as Executors of the Estate of Richard T. Wilson, jr., deceased, petitioner, vs. Charles W. Anderson, Collector of Internal Revenue for the Third District of New York. Petitions for writs of certiorari and exhibit thereto. Filed October 18, 1932. File Nos. 37157, 37158.

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